92-476

Supreme Court, U.S.
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No. 92-_____.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARRIBA, LIMITED,
Petitioner,
v.
PETROLEOS MEXICANOS,
Respondents.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Following plaintiff's submission of evidence confirming its good faith belief that there exists a close relationship between the instrumentality of a foreign state and other defendants, the district court found sufficient basis to permit discovery on the claim that the jurisdictional contacts of those other defendants may be attributed to the instrumentality, thus stripping it of immunity provided under the FSIA: May the appeals court instruct the dismissal of all claims against the instrumentality without permitting any jurisdictional discovery?

2. Where the enabling statute provides that an instrumentality of a foreign state may sue and be sued, is there a sufficient basis for the district court's decision to permit discovery on the claim that any immunity from suit has been waived?

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ARRIBA, LIMITED,
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v.

PETROLEOS MEXICANOS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner Arriba, Limited[1] prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Arriba Ltd. v. Petroleos*

1. In compliance with Rule 29.1 of the Rules of this Court, Petitioner represents that it does not have a parent company or any subsidiaries.

Mexicanos, 962 F.2d 528 (5th Cir. 1992), and it is set forth in Appendix hereto at 1a-23a. The order of the United States District Court for the Southern District of Texas, reversed by the Fifth Circuit, has not been reported. It is set forth in Appendix at 24a-27a. A related order, by another judge of the same district court, is set forth in Appendix at 28a-32a.

GROUNDS FOR JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). In accordance with Rule 13.1 of this Court, this petition was timely filed within 90 days of the Fifth Circuit's decision, which was issued on June 11, 1992.

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1330 & 1331. The Fifth Circuit's jurisdiction was based upon the "collateral order" doctrine, as applied to the Foreign Sovereign Immunities Act in *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 385-86 (5th Cir. 1991).

STATUTES INVOLVED

This case involves the Foreign Sovereign Immunities Act ("FSIA"), which is codified at 28 U.S.C. §§ 1330, 1441(d) & 1602-1611. The provisions are set forth in the Appendix at 33a-47a. They include 28 U.S.C. § 1605 (a)(1) & (2), which state,

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

STATEMENT OF THE CASE

This case involves claims by Petitioner Arriba against Respondent Petroleos Mexicanos ("Pemex"), an oil company owned by the Republic of Mexico. The court of appeals held that there is no federal jurisdiction over Arriba's claims, because Pemex is entitled to sovereign immunity under the FSIA. Reversing the district court's decision that Arriba was entitled to discovery on the immunity issues, the court of appeals instructed the district court to dismiss Arriba's claims.

Petitioner's claims against Respondent. The claims against Pemex are set forth in two complaints, filed by Arriba in a consolidated proceeding in the United States District Court for the Southern District of Texas. Those complaints are set forth in the Appendix, at pages 48a-66a and 67a-85a. A fair summary of Arriba's claims is as follows:

Arriba is a Bahamian corporation, with its principal place of business in Texas. In 1984, Arriba entered a contract with Comision de Contratos del Sindicato de Trabajadores Petroleros de la Republica Mexicana ("Comision"). Comision is the contracting arm for Mexico's petroleum workers union, Sindicato de Trabajadores Petroleros de la Republica Mexicana ("Sindicato"). The members of Sindicato are the employees of Pemex, a state-owned oil company.

Under the 1984 agreement, Comision agreed to sell Arriba residual oil ("slop oil" remaining after the primary refining process) from Pemex's Minatitlan refinery. The agreement was signed in Houston, and it provided that disputes would be brought in Texas courts under Texas law. In reliance upon this contract Arriba contracted to re-sell the oil.

Beginning in late 1984, Comision made clear to Arriba that the residual oil would not be made available unless Arriba made payments to officials of Sindicato and Pemex. Arriba refused to make such payments, and the oil was not delivered. Arriba then sued Sindicato and Comision in Texas state court, and obtained a default judgment in 1986.

Arriba's efforts to collect the 1986 judgment included a garnishment action against Pemex. Eventually, representatives of Sindicato and Pemex entered settlement discussions with Arriba. Arriba released the 1986 judgment debtors and Pemex in return for a joint venture agreement with Comater S. de R.L. ("Comater"), a corporation formed by Comision, Sindicato and Pemex. The joint venture was to involve operation of three drilling rigs for Pemex, as well as a ten-year effort to refine and market residual oil from Pemex.

There was no performance under the agreement with Comater; so Arriba again filed suit against Sindicato and Comision in Texas state court. This led to a 1989 default judgment, reinstating the 1986 judgment and imposing damages for fraud. Arriba then renewed its efforts to garnish Pemex's debts to the judgment debtors. Arriba's post-judgment garnishment claims began the instant litigation.[2]

Arriba's live pleadings set forth several claims against Pemex. These claims include the following:

- (a) Arriba seeks judgment against Pemex as garnishee in sums sufficient to satisfy Arriba's 1986 and 1989 judgments against Sindicato and Comision.[3]

- (b) Arriba seeks to recover from Pemex under several related RICO counts, all of which are premised upon the close interrelationships among Pemex, Sindicato and Comision.

- (c) Arriba seeks to hold Pemex directly liable for the misconduct of Sindicato and Comision, because (i) those organizations were operated as mere tools or business conduits of Pemex, because (ii) the fiction of their separateness from Pemex was used as a means of

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2. Arriba filed applications for writs of post-judgment garnishment against Pemex in Texas state court in 1989. After the state court issued the writs, Pemex removed the actions to federal court, where they were consolidated into cause H-89-2442. In May 1990, Arriba filed a second federal action (cause H-90-1767), asserting direct claims against Pemex and others. In July 1990, Arriba amended its original garnishment pleadings to add the direct claims against Pemex. Both federal actions were then consolidated under cause H-89-2442.

3. The garnishment claim is stated only in cause H-89-2442.

perpetrating fraud, and because (iii) those entities acted as Pemex's agents.[4]

(d) Arriba seeks to void fraudulent transfers of assets from Comision and Sindicato to Pemex, the effect of which has been to defraud Arriba as judgment creditor under the 1986 and 1989 judgments.

Respondent's motion to dismiss. Rather than answer Arriba's complaints, Pemex moved to dismiss the claims against it for lack of jurisdiction. Pemex claimed immunity under the Foreign Sovereign Immunities Act ("FSIA"). It supported its motions with affidavits. It refused to submit to any discovery, and filed motions for a blanket protective order.

Arriba opposed Pemex's motions. It invoked the "commercial activities" exceptions of the FSIA, providing that foreign states are not immune from suits based upon commercial activity that has a jurisdictional nexus with the United States. *See* 28 U.S.C. § 1605(a)(2). Arriba argued that the jurisdictional contacts of Pemex's agents, employees, alter egos and co-conspirators may be attributed to it for purposes of the commercial activities exceptions. Arriba also invoked the "waiver" exception of the FSIA, arguing that because Pemex has the power to sue and be sued, its sovereign immunity has been waived. *See id.* § 1605 (a)(1).

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4. Pemex is liable, under these theories, for (i) breach of the 1984 agreement, (ii) failure to pay the 1986 judgment, (iii) deception in procuring the release of the 1986 judgment, and (iv) failure to pay the 1989 judgment. Arriba also seeks to hold Pemex liable, under similar theories, for Comater's failure to perform the 1987 joint venture agreement.

In opposing Pemex's motions, Arriba submitted that it was entitled to conduct jurisdictional discovery on (a) the question whether Pemex's relationships with Comision and Sindicato - as employees, agents, alter egos and/or co-conspirators of Pemex - were sufficient to support Arriba's position that their jurisdictional contacts should be attributed to Pemex, and (b) the question whether Pemex had waived its immunity from suit. In this connection, Arriba submitted affidavits[5] to confirm its good faith belief that discovery on these issues was appropriate. The evidence concerning Pemex's relationships with Comision and Sindicato included evidence that

- At least through 1987, Pemex's collective bargaining agreement granted Comision the right to execute contracts with third parties "as though they were executed by direct administration of Petroleos Mexicanos";

- Sindicato appoints five of the eleven directors of Pemex;

- Sindicato (through Comision) has the right to receive at least 50 percent of Pemex's contracts;

- Sindicato appoints half of the commission that hires and fires Pemex's administrative and executive personnel; and

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5. One affidavit was from John R. Newton, an economist with Nathan Associates, Inc. who specializes in Latin American economic issues. His affidavit is set forth in the Appendix at 86a-94a. A second affidavit was from Jose R. Padilla Castellanos, Professor of Constitutional Law at the National Autonomous University of Mexico. His affidavit is set forth in the Appendix at 95a-108a.

- In general, the relationship among Pemex, Sindicato and Comision display a degree of interpenetration not found in U.S. labor relations.

(*See* App. at 89a-92a and 105a-106a.) The evidence concerning Pemex's waiver of its sovereign immunity included evidence that

- Article 13 of the Organic Law of Petroleos Mexicanos grants Pemex the general powers of attorney that are set forth in Article 2554 of the Mexican Civil Code;

- This grant of powers gives Pemex the power to sue and be sued, both in Mexico and in foreign courts; and

- Article 17 of the Organic Law of Petroleos Mexicanos designates which of the courts in Mexico may hear disputes involving Pemex, but it does not affect litigation outside of Mexico.

(*See* App. at 97a-99a and 109a-111a.)

The district court's denial of Respondent's motion to dismiss. In January 1991, United States District Judge Norman Black issued an Order denying Respondent's motions to dismiss. (App. at 24a-27a.) Concerning the FSIA argument, the court concluded that Pemex "has not established that its activities do not fall within the commercial activity exception to immunity under the FSIA." At this point, "the nature of the relationship between Pemex and those who allegedly engaged in illegal acts [has] not yet been decided." (App. at 26a.)

Judge Black also denied Pemex's motion for reconsideration of an order entered by United States District Judge Melinda Harmon in March 1990. In that order, Judge Harmon had denied Pemex's earlier motion to dismiss Arriba's garnishment claims, ruling that Arriba was entitled to discovery on the issue of sovereign immunity. (App. at 28a-32a.)

The district court's order also disposed of several other related motions. It denied Pemex's motion for blanket protection from discovery. In addition, it denied Pemex's motion for a more definite statement of Arriba's claims. (App. at 27a.) Thus, the district court told Arriba that its pleadings were sufficient, and that it could proceed with jurisdictional discovery.

The Fifth Circuit's instruction to dismiss Petitioner's claims. Pemex took an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit reversed, instructing the district court to dismiss all of Arriba's claims against Pemex.

The court of appeals concluded that the district court erred in ordering jurisdictional discovery on the question of attributing jurisdictional contacts to Pemex. While recognizing that this Court's opinion in *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*"Bancec"*), "would permit FSIA jurisdiction in American courts over a commercial activity predicated upon principal-agent or veil-piercing allegations against a foreign sovereign instrumentality," the court concluded that the allegations in Arriba's complaint "do not meet the *Bancec* test." *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 537 (5th Cir. 1992), App. at 17a-18a. The court gave three reasons for this conclusion: First, the concept of piercing the corporate veil--*i.e.*, the specific concept involved in *Bancec*--

is inapposite, because there is no shareholder relationship between Pemex and either Comision or Sindicato. *Id.* at 535, App. at 13a-14a. Second, the concept of agency is no help, because the complaint does not allege any manifestations by Pemex that Comision or Sindicato could act for Pemex, and because one of Arriba's allegations[6] is "the *antithesis* of agency liability." *Id.* at 536, App. at 14a-16a (emphasis in original). Finally, "equity is not served by holding Pemex accountable in American courts on the broad but vague attribution theory alleged by Arriba," which does not "conform to the standard articulation of piercing the corporate veil" and which "cannot be proved without massive, intrusive discovery in Mexico on highly sensitive domestic issues." *Id.*, App. at 16a-17a.

Although acknowledging that jurisdictional discovery is "the usual procedure for resolving contested jurisdictional issues," the court reasoned that a different calculus applies in an FSIA case, where the defendant's "legitimate claim to immunity from discovery" warrants a rule that "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *Id.* at 534, App. at 11a. Discovery is not warranted here, because Arriba's complaint is not specific enough; that is, "discovery may be used to confirm specific facts that have been pleaded as a basis for enforcing the commercial activities exception, but it cannot supplant the pleader's duty to state those facts at the outset of the case." *Id.* at 537 n.17, App. at 19a n.17. Here, discovery would threaten the principles of "judicial comity among nations,"

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6. The allegation in question relates solely to the 1987 negotiations involving Comater. (App. at 75a, ¶ 36.) The court of appeals did not mention this fact. The court also failed to note that the corresponding allegation in Arriba's subsequent pleading does not support the court's statement, even as to the 1987 negotiations. (App. at 54a, ¶ 28.)

which are "increasingly important in today's global economy," and it "could seriously impede our relations with Mexico." *Id.* at 537, App. at 18a (footnote referring to the movie *JFK* omitted).[7]

The court of appeals then addressed the proposition that Pemex's powers to sue and be sued, as set forth in Article 17 [sic][8] of its enabling legislation, could constitute

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7. The court of appeals refers to Arriba's claims as "*JFK*-like charges." 962 F.2d at 537, App. at 18a.

Both in the district court and on appeal, Pemex's strategy in this case was to cast aspersions on Arriba. It asserted that Arriba knowingly participated in what Pemex claims was illegal activity, and it proclaimed that Arriba's suit is an insult to the people and government of Mexico.

Unfortunately, Pemex's approach colored the court's interpretation of Arriba's claims. At several points, its description of Arriba's position is inaccurate. *See id.* at 534, App. at 11a-12a ("Arriba has alleged a breathtakingly bold theory" involving "sales of Mexican government-owned residual oil 'off the books' of Pemex and into Arriba's tanks at a much-reduced price"; "this rogue's bargain . . . depended for all practical purposes upon the theft of Mexico's oil products"); *see also id.* at 530-31 n.3, App. at 3a-4a n.3 (summarizing Pemex's position).

Pemex has taken the position that all contracts with Comision were voided in 1984. Arriba disagrees. Comision continued to enter contracts on Pemex's behalf after 1984, and that practice was well-known, lawful, accepted and aboveboard. It was endorsed in Pemex's own collective-bargaining agreements, and it was neither unlawful nor immoral. What *was* unlawful and immoral was the practice of interfering with certain Comision contracts unless kickbacks were paid to officers of Pemex and Sindicato.

8. The court referred to the wrong statute, a fact which has significant implications for Arriba's claim of waiver. Article 17 of Pemex's Organic Act merely provides that within Mexico, the federal courts have exclusive jurisdiction over disputes involving Pemex. It is Article 13, which broadly incorporates Article 2554 of the Mexican Civil

a waiver of immunity. First, it distinguished cases equating "sue and be sued" provisions with waivers of sovereign immunity, by stating that *Bank of the United States v. Planters' Bank of Georgia* , 22 U.S. (9 Wheat.) 904, 6 L. Ed. 244 (1824), "has no bearing on the issue of whether *foreign* sovereigns are immune from suit in the courts of the United States." *Arriba*, 962 F.2d at 538, App. at 21a (emphasis in original). The court then tried to distinguish this Court's reference to "sue and be sued" waivers of sovereign immunity in the *Bancec* decision, stating that the waiver in Article 17 [sic][9] opens the door only to *some* of the judicial remedies against Pemex. *Id.* at 538-39, App. at 21a-22a.

In accord with its opinion, the court of appeals reversed the district court's order, with instructions to dismiss the claims against Pemex with prejudice. *Id.* at 539, App. at 22a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit has ordered the dismissal of all of Arriba's claims against Pemex, holding that Arriba is not entitled to any jurisdictional discovery at all. In so doing, the Fifth Circuit focused solely upon its own interpretation of Arriba's complaints, ignoring altogether the evidentiary material that Arriba was able to present without discovery. This evidence confirmed the reasonableness of Arriba's good faith belief in its allegations concerning the interrelationships among Pemex, Sindicato and Comision. The Fifth Circuit, however, has ruled that the district court had no discretion to permit jurisdictional discovery, opting instead for special

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Code, that grants Pemex an unrestricted power to sue and be sued.

9. *See* the preceding footnote.

"circumspect" treatment of claims against business enterprises whose shares are owned by foreign governments. This decision places the Fifth Circuit in square conflict with other courts of appeals. The conflict should be resolved by this Court.

This Court should also address the Fifth Circuit's ruling that, as a matter of law, Pemex's immunity has not been waived. This Court's decisions make clear that broad powers to sue and be sued constitute waivers of sovereign immunity. This is true not only as to domestic instrumentalities, but also as to foreign instrumentalities as well.

I. The decision of the Fifth Circuit to dismiss Arriba's claims before allowing any jurisdictional discovery squarely conflicts with decisions of other circuits.

The thrust of Arriba's position is straightforward: Because Comision and Sindicato acted as agents, alter egos, and co-conspirators of Pemex, their jurisdictional contacts are attributable to Pemex. Arriba's pleadings take this position, and it submitted evidence that supports its good faith belief that this position is true. It was, therefore, well within the district court's discretion to order that Arriba was entitled to conduct jurisdictional discovery.

A. Plaintiffs enjoy a general right to conduct jurisdictional discovery.

The general rule is that plaintiffs are entitled to take discovery on jurisdictional issues. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues."),

citing Note, *The Use of Discovery to Obtain Jurisdictional Facts*, 59 Va. L. Rev. 533 (1973); *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727 (11th Cir. 1982).

In this case, the Fifth Circuit recognized the general rule. *Arriba*, 962 F.2d at 534, App. at 11a (referring to "the usual procedure for resolving contested jurisdictional issues").

B. The Fifth Circuit has carved out an exception for FSIA cases.

According to the Fifth Circuit, FSIA cases are not subject to the general rule. An FSIA plaintiff must allege "specific facts" in his complaint, "at the outset of the case"; otherwise, he is not entitled to any discovery. *See Arriba*, 962 F.2d at 537 n.17, App. at 19a n.17. The Fifth Circuit did not even *mention* the evidence submitted by Arriba and instead restricted the analysis to its own interpretation of Arriba's complaint. Construed favorably, as it must be, Arriba's complaint established that Pemex engaged in conduct -- as principal, alter ego and co-conspirator of Comision and Sindicato -- satisfying the commercial activities exception to the FSIA. Supporting affidavits, gathered from a Ph.D. economist and a professor in Mexican constitutional law, provided evidence confirming these allegations. For example, the affidavits show that Pemex granted Comision the right to execute contracts as if they were executed by Pemex itself, and that Sindicato appoints five of the eleven members of Pemex's board of directors. *See supra*, at 7; App. at 89a-92a and 105a-106a. Such interrelationships permit attribution of jurisdictional contacts. The district court was clearly within its discretion to order jurisdictional discovery into these issues.

In carving out its exception, the Fifth Circuit's apparent concern was "judicial comity among nations." *Id.* at 537, App. at 18a. Arriba's theory, we are told, "cannot be proved without massive, intrusive discovery in Mexico on highly sensitive domestic issues," *id.* at 536, App. at 17a, so that limited discovery is "impossible under these allegations." *Id.* at 537 n.17, App. at 19a n. 17. Indeed, Arriba's claims "could seriously impede our relations with Mexico." *Id.* at 537, App. at 18a.[10] Although the FSIA is itself the product of well-considered policy determinations by Congress and the Executive Branch, the Fifth Circuit is now trying to supplement those determin- ations by imposing burdensome procedural rules.

C. The Fifth Circuit's rule is in conflict with decisions of the Second, Sixth, Ninth, and District of Columbia Circuits.

The rule imposed by the Fifth Circuit in this case conflicts with the approach taken in FSIA cases by other courts of appeal.

Consider the following passage by the Sixth Circuit:

> In the absence of statutory direction, the district court has considerable discretion in devising the procedure to inquire into the existence of jurisdiction. Thus, the district court may consider affidavits, allow discovery, hear oral testimony, order an evidentiary hearing, or even postpone its

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10. The court likens the situation to suits under 42 U.S.C. § 1983 that challenge individual government officials' qualified immunity. *Arriba*, 962 F.2d at 534, App. at 11a, *citing Anderson v. Creighton*, 483 U.S. 635 (1987).

> determination if the question of jurisdiction is intertwined with the merits. However, *we stress that a party must be given an ample opportunity to secure and present evidence relevant to the existence of jurisdiction.*
>
> . . . [S]ince entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, and must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues.

Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 451 (6th Cir. 1988) (emphasis added; citations and internal quotation marks omitted).

Similarly, the District of Columbia Circuit has specifically adopted the Sixth Circuit's position, stating:

> "[S]ince entitlement of a party to immunity from suit is such a critical preliminary determination, the parties have the responsibility, and must be afforded a fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues." *Gould*, 853 F.2d at 451. Thus, to address a motion to dismiss under Rule 12(b)(1) where the suit involves a foreign sovereign and the court's jurisdiction over the sovereign is contested, the district court must do more than just look to the pleadings to ascertain whether to grant the motion to dismiss. The district court has "considerable latitude in devising the

> procedures it will follow to ferret out the facts pertinent to jurisdiction." *Prakash [v. American Univ.]*, 727 F.2d [1174, 1179 (D.C. Cir. 1984)].

Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 449 (D.C. Cir. 1990).

Decisions of the Ninth and Second Circuits are to the same effect. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992) ("To the extent that the jurisdictional facts are disputed on remand, the parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed."); *Filus v. LOT Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990) ("[G]enerally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue; but until she has shown a reasonable basis for assuming jurisdiction, she is not entitled to any other discovery."). *Cf. Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 892 n.2 (7th Cir. 1991) (affirming dismissal on claim where plaintiff did not request discovery; "In general, plaintiffs are entitled to conduct discovery for the limited purpose of establishing jurisdictional facts under the Immunities Act prior to any dismissal."); *Gerding v. Republic of France*, 943 F.2d 521, 524 (4th Cir. 1991) (affirming dismissal where plaintiff sought no discovery), *petition for cert. filed*, 60 U.S.L.W. 3481 (U.S. Dec. 4, 1991) (No. 91-956).

The approach taken by the Fifth Circuit in this case is precisely to the contrary.[11] While all other circuits that have considered the issue would have affirmed the district court's decision to permit jurisdictional discovery *before* finally resolving Pemex's motion to dismiss, the Fifth Circuit turned Arriba out of court, and this despite evidence secured outside discovery that supports Arriba's claims. Writ of certiorari should issue to resolve this conflict among the circuits.

II. The Fifth Circuit's decision that, as a matter of law, Respondent has not waived its sovereign immunity conflicts with this Court's decisions on the waiver of sovereign immunity.

The Fifth Circuit held, as a matter of law, that Pemex's sovereign immunity had not been waived. That holding conflicts with the decisions of this Court.

A. Granting a domestic government instrumentality the powers to sue and be sued clearly waives its sovereign immunity.

When a domestic government agency has been granted the powers to sue and be sued, it has no immunity. This Court's decisions make that quite clear. *See, e.g.*,

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11. As noted earlier, the Fifth Circuit analogized an FSIA suit to a § 1983 case involving the qualified immunity of a defendant. Arriba submits that the analogy is flawed. The situation of an individual government employee is quite different from that of a corporation set up as a separate profit-making business. Besides, the cases involving § 1983 immunities encourage early resolution of questions of law, not the disregard of genuine issues of fact. *See Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) ("discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved").

Loeffler v. Frank, 486 U.S. 549 (1988); *Franchise Tax Bd. of California v. United States Postal Serv.*, 467 U.S. 512 (1984).[12] As the Court explained in *Loeffler*,

> Congress . . . has waived the sovereign immunity of certain federal entities from the times of their inception by including in the enabling legislation provisions that they may sue and be sued. In *FHA v. Burr*, 309 U.S. 242, 245 (1940), the Court explained:
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> > "[S]uch waivers by Congress of governmental immunity . . . should be liberally construed. . . . [I]t must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued,' that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."
>
> * * *
>
> By launching "the Postal Service into the commercial world," and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's "cloak of sovereignty" and given it the "status of a private commercial enterprise." *[Library of Congress v.] Shaw*, 478 U.S., at 317, n. 5.

486 U.S. at 554-55, 556.

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12. Significantly, the rule applies to garnishment proceedings. *Federal Housing Admin., Region No. 4 v. Burr*, 309 U.S. 242 (1940).

These decisions reflect a real-world business fact: If the sovereign did not bestow its instrumentality with powers to sue and be sued, then the instrumentality would be at a competitive disadvantage with private firms. Conversely, having used the trappings of private enterprise to gain access to the marketplace, the instrumentality cannot then clothe itself in the cloak of sovereignty.

B. This Court's decision in *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983), makes clear that principles of "sue and be sued" waiver apply in the FSIA context.

Under the FSIA, a "foreign state" (defined to include an instrumentality, such as Pemex) is *not* immune

> . . . in any case -
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver . . ..

28 U.S.C. § 1605(a)(1).

Congress is presumed to be aware of existing law, including decisional law, when it passes legislation. *See Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S. Ct. 317, 325 (1990). Thus, it is both proper and important to consider the state of this Court's decisions on sue-and-be-sued waiver as of 1976, the year Congress enacted the FSIA. As explained above, these decisions clearly show that the

grant of powers to sue and be sued waived immunity. There is no reason to believe that such cases are limited only to domestic agencies, and not as well to those invoking the FSIA. Indeed, this approach finds explicit support in this Court's decision of *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983)("*Bancec*"). For present purposes, the relevant passage is set forth in a discussion of "the nature of government instrumentalities":

> Separate legal personality has been described as "an almost indispensable aspect of the public corporation." [W. Friedmann, *Government Enterprise: A Comparative Analysis*, in GOVERNMENT ENTERPRISE: A COMPARATIVE STUDY 303], at 314. Provisions in the corporate charter stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities, thereby enabling third parties to deal with the instrumentality knowing that they may seek relief in the courts.[16]
>
> [16] [J. THURSTON, GOVERNMENTAL PROPRIETARY CORPORATIONS IN THE ENGLISH-SPEAKING COUNTRIES 7], at 43-44. This principle has long been recognized in courts in common-law countries. *See Bank of United States v. Planters' Bank of Georgia*, (22 U.S.) 9 Wheat. 904, 6 L.Ed. 244 (1824); *Tamlin v. Hannaford*, [1950] 1 K.B. 18, 24 (C.A.).

Bancec, 462 U.S. at 625.

The Fifth Circuit expressed fear that this approach to waiver "would presumably deny Pemex sovereign immunity in most if not all future actions to which it is a party." *Arriba*, 962 F.2d at 538, App. at 20a.[13] It then construed *Bancec's* language to mean only that sue-and-be-sued powers waive *some* judicial remedies. *Id.*[14] Whether or not Pemex would be stripped of sovereign immunity in all subsequent cases is beside the point if, as Arriba argues, this was the intent of Congress. In any event, Arriba submits that *Bancec* contains no such limitation. And surely this Court's cases decided prior to enactment of the FSIA contained no such limitation.

C. Petitioner has made a sufficient showing that Respondent waived its sovereign immunity.

The Fifth Circuit appears to state that Pemex can be sued, but only in Mexico's federal courts. *Arriba*, 962 F.2d at 538-39, App. at 21a-22a. It relies upon Article 17 of Pemex's Organic Act (which is set forth at App. 109a). The

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13. Arriba acknowledges that considerations of due process might still apply to attempts to exercise personal jurisdiction over Pemex.

Arriba would also note that the FSIA contains procedural protections that apply even when an instrumentality is not immune from suit. *See* 28 U.S.C. § 1330, App. at 33a (federal jurisdiction); *id.* § 1608, App. at 40a-43a (procedures for service and default); *id.* § 1441(d), App. at 33a-34a (bench trial).

14. In a footnote, the Fifth Circuit mentions *Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7 (D.D.C. 1986), *aff'd*, 834 F.2d 203 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988). *Arriba*, 962 F.2d at 538 n. 19, App. at 20a n. 19. Without discussing any of the authorities cited by Arriba in this case, the *Dayton* courts concluded that the FSIA does not recognize "sue and be sued" waivers. The Fifth Circuit does not appear to embrace the reasoning of *Dayton*.

expert testimony explains, however, that Article 17 simply provides that within Mexico, it is the federal courts that must hear cases involving Pemex.

As Arriba has consistently maintained, it is Article 13 of the Organic Act that is relevant. That statute provides,

> The Director General and Subdirectors shall have all authority corresponding to the general agents for litigations and collections, for ownership and management actions, and special authority requiring a special clause according to the Law, in the terms of the first three paragraphs of Article 2554 of the Civil Code for the District and Federal Territories . . ..

(App. at 109a.) The Fifth Circuit does not even mention this provision; but as expert testimony establishes, it is the very language that Article 2554 of the Civil Code requires in order to create general powers of attorney for lawsuits and collections. (App. at 98a and 111a.) As the expert testimony again explains, these general powers enable Pemex to sue and be sued, both inside and outside Mexico. (App. at 98a-99a.)

When Mexico "launched Pemex into the commercial world,"[15] it provided that Pemex had the power to sue and be sued. If Pemex were a United States instrumentality, this Court would have little difficulty concluding that Pemex has waived its sovereign immunity. *See Loeffler v. Frank*, 486 U.S. at 556. In this case, however, the Fifth Circuit has held that Pemex has *not* waived its immunity, as a matter of

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15. *See Federal Housing Admin., Region No. 4 v. Burr*, 309 U.S. 242, 245 (1940).

law. It concluded that Arriba has not even made a sufficient showing to entitle it to discovery on the issue. This conclusion conflicts squarely with *Bancec* and should be corrected.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

ARRIBA LIMITED, Plaintiff-Appellee,
v.
PETROLEOS MEXICANOS, a/k/a Pemex, Defendant-Appellant.

Nos. 91-2180, 91-6311.

United States Court of Appeals,
Fifth Circuit.

June 11, 1992.

OPINION

Petroleos Mexicanos ("Pemex"), the national oil company of the United Mexican States, appeals the district court's denial of its motion to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11. Pemex, one of the world's largest oil companies and crude oil exporters, was sued by Arriba, Ltd., a Bahamian corporation with its principal place of business in the United States, for damages stemming from a failed contract between Arriba and an arm of Pemex's union, the Petroleum Workers Union of Mexico, Sindicato de Trabajadores Petroleros de la Republica Mexicana ("the Union"). The district court held that Pemex failed to establish that its activities fell outside the "commercial activities" exception to the FSIA's recognition of sovereign immunity. *See* 28 U.S.C. § 1605(a)(2). Because we hold that Pemex is entitled to sovereign immunity, we reverse the district court's ruling and dismiss

Arriba's action with prejudice.[1]

I.
BACKGROUND

This is the latest in a series of lawsuits that Arriba has brought since 1985 against the Union, its private contracting arm, Comision de Contratos del Sindicato de Trabajadores Petroleros de la Republica Mexicana ("the Commission"), and several former Union officials. Pemex is a relative newcomer to the litigation, having been sued by Arriba for the first time in 1990. All these lawsuits flow from a single 1984 transaction in which several officials of the Union and its Commission allegedly agreed to supply Arriba with Pemex's residual or "slop" oil at bargain prices--without the need for a contract with Pemex. Arriba apparently owes its very corporate existence to this ill-starred venture.

According to its amended complaint, Arriba was chartered in 1984 as a direct result of negotiations between Bill Flanigan, who went on to serve as Arriba's president, and "persons who were acting as the agents and

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[1]Pemex alternatively contends that even if the commercial activities exception applies, the Act of State doctrine renders this case non-justiciable. Pemex raised the Act of State doctrine in its motion to dismiss, but the district court did not address this issue in its January 28, 1991 ruling. Following that decision, Pemex moved to certify both the sovereign immunity and Act of State questions for interlocutory appeal. 28 U.S.C. § 1292(b). The court granted Pemex's motion as well as its request for a stay pending appeal. The appeal on the Act of State doctrine was filed under a separate case number in this court [case No. 91-6311], but the discussion below renders that appeal moot.

representatives" of Pemex, the Union and its Commission.[2] As part of a written agreement signed at Houston, Texas in October of that year ("the Agreement"), the Commission agreed to sell Arriba a minimum of 6 million barrels of Pemex's residual oil. The Agreement was signed by one Ramiro Quinones Fabela ("Quinones"), who Arriba asserts had presented proof of his authority to act on the Commission's behalf. Relying on representations by Quinones and his associates, Arriba contracted to sell the residual oil at a substantial profit. Beginning in November 1984, however, Quinones and others demanded payments from Arriba, to be used to bribe Pemex and Union officials to perform their part of the Agreement. Arriba refused to pay--despite repeated protests from Quinones and his companions, who twice physically assaulted Flanigan. Arriba never received the oil, even after Flanigan met with various Commission and Union officials and was assured that its delivery was forthcoming.

Arriba admits that the Agreement was structured to avoid any direct dealings with Pemex officials or any other branch of the Mexican government.[3] It is therefore

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[2]The complaint cryptically alleges that at the Union's suggestion, Arriba was incorporated in the Bahamas "because of the Sindicato's own banking relationships there."

[3]This circumspection may not be surprising. Although we need not decide the issue, Pemex asserts that Arriba's agreement to purchase oil from Pemex through private intermediaries was illegal under Mexican law. According to an opinion by Mexico's Attorney General prepared for this litigation, an official proclamation of Mexico's then-Secretary of Budget and Planning, Carlos Salinas de Gortari, issued on Jan. 28, 1984--nine months *before* the Agreement was signed--declared all government contracts which failed to comply with certain public contracting procedures to be null and void. This proclamation prevented Pemex from granting concessions to the Union on oil sales. *See* MEX.ATTY.GEN.OP. ¶¶40-44 (Aug. 24, 1990). Prior to the

important to understand who Arriba considers to be Pemex's "agents." Pemex was not a party to the Agreement, and Arriba never negotiated with Pemex for the purchase of oil. Instead, Arriba insists that Quinones and his associates should be considered Pemex's "agents" by implication. Pemex's activities were "inextricably integrated" with those of the Union and its Commission, Arriba argues, so that all three functioned as a single entity.. As described in the complaint, the three entities

> often serve as agents for one another. They make promises and representations for one another. They stand behind one another's contracts. The business of each is structured so that it is necessarily dependent upon the cooperation of the others.

Proclamation, a fixed percentage of Pemex contracts was granted to the Union without public bidding. "It was contemplated," the opinion observes,

> that the Union would either perform these [no-bid] contracts directly or by subcontract, retaining some percentage as profit; the profit in either case was expected to finance social programs for the workers. In practice, however, the Union's leaders created the Commissions in order to keep the profit outside of the Union, so that workers themselves did not benefit. PEMEX, in turn, was also damaged because it did not receive the best terms when contracting.

Id. at ¶42. The Salinas proclamation was part of President Miguel de la Madrid Hurtado's "moral renovation" campaign aimed at fighting corruption in the letting of government contracts. *See, e.g., Mexico Carries War on Corruption to Unions*, N.Y. TIMES A7, col. 1 (Feb. 6, 1984). Both Pemex and the United Mexican States as *amicus curiae* suggest that Arriba had reason to tread lightly in the face of a high-profile government initiative that rendered illegal the type of arrangement that Arriba now seeks to enforce. *See also* ATTY. GEN. OP. at ¶¶44-47.

Borrowing some familiar terms from American corporate law, Arriba argues that Pemex's status as a government agency is a sham that should not be respected. The separate legal identities of Pemex, the Union and the Commission have blurred into a single functional entity, making each of them "alter egos" of the other and permitting Arriba to "pierce the veil" to reach Pemex's assets.[4]

Arriba sued the Union, its Commission, Quinones and three other Union officials for the first time in June 1985, obtaining a $92 million default judgment in Texas state court the following April. Attempting to satisfy that judgment, Arriba secured a writ of garnishment against Pemex in February 1987. Pemex removed the garnishment proceedings to federal court and sought to dismiss on sovereign immunity grounds. Meanwhile, Arriba entered into negotiations with the Union and its Commission involving the creation of a new joint venture. These talks led to a settlement in October 1987 that released the default judgment and dismissed the garnishment action against Pemex with prejudice.[5]

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[4]Thus, for instance, Arriba treats Quinones' alleged representations on behalf of the Commission--a private entity--as if they had been made by Pemex itself. That Quinones allegedly represented the Commission transformed him into Pemex's "agent" as well. The legal implications of Arriba's "agency" and "alter ego" theories on Pemex's status as a government agency asserting sovereign immunity are discussed below.

[5]In a bizarre twist, Arriba and Flanigan had themselves been sued in May 1987 by what appellant acknowledges was "[a] second, different Arriba Limited (the 'Second Arriba')." Like its namesake, the Second Arriba was incorporated in the Bahamas. Arriba's complaint asserts that Pemex, the Union and the Commission conspired to create the Second Arriba so that this "bogus new entity [would] sue Arriba to enjoin it from enforcing Arriba's valid judgment, which the new entity falsely alleged belonged to it. That suit was an obvious sham, designed to mislead and defraud the courts." Arriba and Flanigan counterclaimed against the

Nearly two years later, Arriba returned to state court, alleging that the Union's and Commission's refusals to abide by the settlement terms revived its claims arising from the 1984 Agreement. In April 1989, the court granted a second default judgment against the Union, its Commission and the private defendants--this time including punitive damages boosting the total award to more than $273 million. Arriba again obtained a writ of garnishment against Pemex in an attempt to execute the two default judgments,[6] and Pemex again removed to federal court. Arriba's amended complaint asserts that Union officials informed Arriba that Pemex had begun "stripping the assets" of the Union to prevent Arriba from enforcing its judgment. Those same officials also allegedly warned Flanigan that he faced criminal prosecution by Mexican authorities if he continued to pursue legal remedies.

On May 31, 1990, while Pemex's motion to quash the writ of garnishment was pending, Arriba filed its first action against Pemex in the federal district court for conduct stemming from the 1984 Agreement. Among other things, Arriba accused Pemex of engaging in a pattern of racketeering activity in Mexico as well as theft by extortion under Texas law. Relying on the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(a)-(d), Arriba sought treble damages, costs of suit, attorneys

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Second Arriba in June, renewing their allegations against the Union and the Commission stemming from the 1984 Agreement. However, the October 1987 settlement apparently ended the Second Arriba's lawsuit against Arriba.

[6]The following June, Arriba--armed with a temporary restraining order from the Harris County court--attempted to attach the official plane of Mexican President Salinas after it had landed at Love Field in Dallas, Texas. This effort fizzled when Mexican authorities demonstrated that the Boeing 757 belonged to their government.

fees, and other relief. The district court later consolidated Arriba's RICO action with its applications for writs of garnishment against Pemex for the 1986 and 1989 default judgments. The claimed damages had now ballooned to more than $1 billion.

Pemex moved to dismiss the consolidated action based on the FSIA, arguing in the alternative that the case was non-justiciable under the Act of State doctrine. The district court rejected Pemex's sovereign immunity defense, prompting this appeal.[7]

II.
APPELLATE JURISDICTION

[1] We have jurisdiction to hear this appeal. This court has recently decided that the interlocutory denial of a claim of foreign sovereign immunity is appealable under the collateral order doctrine. *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 385-86 (5th Cir. 1991). Arriba contends, however, that the district court's partial dismissal of its earlier garnishment claim was not timely appealed by Pemex. This is true, although in light of *Stena* and the following discussion, our refusal to consider that minor

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[7]The district court also ruled that because the state court judgment against the private defendants did not involve Pemex, Arriba had failed to obtain a judgment against a foreign state or its instrumentality within the meaning of § 1602 of the FSIA. Consequently, Arriba could not attach Pemex's assets to satisfy that judgment unless Arriba showed that the juridical separateness of Pemex as a government instrumentality should not be respected. The district court therefore found Arriba's attempt to garnish Pemex solely because Pemex was allegedly indebted to some or all of the private defendants to be meritless. However, Arriba's garnishment claim was not dismissed in its entirety because the district court ultimately ordered additional discovery on the question of Pemex's juridical separateness, an issue which we discuss below.

aspect of Pemex's appeal yields Arriba a Pyrrhic victory. *See Stena*, 923 F.2d at 391-93 (garnishment immunity is subject to principles of FSIA).

III.
JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

[2] The FSIA sets forth "the sole and exclusive standards to be used" to resolve all sovereign immunity issues raised in federal and state courts. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976), U.S.Code Cong. & Admin.News 1976, pp. 6604, 6610. While the FSIA recognizes the general rule that foreign states are entitled to immunity from jurisdiction in American courts, § 1605 codifies several exceptions to that rule. Arriba principally invokes the "commercial activities" exception, which provides that foreign states are not immune from suit in U.S. courts when the action is based on commercial activity that has a jurisdictional nexus with the United States. 28 U.S.C. § 1605(a)(1)-(2). That Pemex is a foreign government instrumentality is undisputed. *See Stena*, 923 F.2d at 386. As defined in the Act, the term "commercial activity"

> means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). The drafters of the FSIA envisioned that the courts "would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill." House Report at 16 U.S.Code Cong. & Admin.

News 1976, at 6615. However, in listing possible examples of "particular transactions or acts" which might fall within the exception, the House Judiciary Committee specifically included "a single contract, if of the same character as a contract which might be made by a private person." *Id.* Arriba maintains that if attributable to Pemex, the 1984 Agreement constitutes commercial activity within the meaning of the statute. *See Stena*, 923 F.2d at 387 n. 9.

[3] Nonetheless, merely showing that a foreign state or its instrumentality has engaged in "commercial activities" within the meaning of the Act is not sufficient: only those commercial activities with a sufficient "jurisdictional nexus" to the United States fall within the exception. *See Stena*, 923 F.2d at 386. Section 1605(a)(2) identifies three types of actions that are sufficiently connected to the United States to satisfy the jurisdictional nexus requirement:

> (1) a commercial activity carried on in the United States;
> (2) an act performed in the United States in connection with a commercial activity carried on outside the United States; or
> (3) a commercial activity carried on outside the United States that has a direct effect in the United States.

Id.

Section 1605(a)(2) also requires that there be a material connection between the plaintiff's cause of action and the commercial acts of the foreign sovereign. *Stena, id.* at 386-87. Thus, "[i]n order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based." *Id.* at 387. Isolated or unrelated commercial actions by a

foreign sovereign in the United States do not authorize the exception. *Id. See also De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985).

[4] The parties vigorously dispute their respective burdens of proof on the commercial activity issue, yet case law resolves such questions almost uniformly. Once the defendant alleges that it is a "foreign state", the plaintiff must produce some facts to show that the commercial activity exception to immunity applies, but the defendant retains the ultimate burden of proof on immunity. *Stena*, 923 F.2d at 390 n. 14; *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n. 6 (5th Cir. 1989). There is an exception to this general rule. Foreign instrumentalities and agencies are accorded a presumption of independent status. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27, 103 S.Ct. 2591, 2599-2600, 77 L.Ed.2d 46 (1983) (*"Bancec"*). Although *Bancec's* description of the basis for disregarding the separate juridical status of foreign agencies occurred in a discussion of substantive liability, its principles have been applied to FSIA jurisdictional issues. *See Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 446 (D.C. Cir. 1990); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989). Hence, where, as here, jurisdiction depends on an allegation that the particular defendant was an agent of the sovereign, the plaintiff bears the burden of proving this relationship. *Foremost-McKesson, Inc.*, 905 F.2d at 447; *Hester*, 879 F.2d at 176.[8]

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[8]The district court erred in apparently saddling Pemex with the burden of proving it is not an agent or alter ego of the Union and the Commission.

[5,6] Arriba contends that, having alleged jurisdiction under the commercial activity exception, it is entitled to pursue discovery to support its allegations. *See, e.g., Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332-33 (2d Cir. 1990); *Foremost-McKesson, Inc.*, 905 F.2d at 448-49; *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451-52 (6th Cir. 1988), *cert. dismissed, Pechiney and Trefimetaux v. Gould, Inc.*, ___ U.S. ___, 112 S.Ct. 1657, 118 L.Ed.2d 317 (1992). The district court agreed, drawing an analogy to the usual procedure for resolving contested jurisdictional issues. *See, e.g., DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1270-71 and n. 12 (5th Cir. 1983); *C. Wright & A. Miller,* Federal Practice & Procedure § 1350. The court was enticed into its discovery order prematurely, however. Several courts have observed the tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery. The potential conflict is not unlike that attendant to claims that challenge domestic government officials' qualified immunity from suit. *See Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). At the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination. A necessary prerequisite to an order for limited discovery is a district court's clear understanding of the plaintiff's claims against a sovereign entity. It is at this first step that the district court stumbled.

[7] Carefully read, Arriba's pleadings allege much less than they imply in the way of "commercial activity" by or on behalf of Pemex. To be sure, Arriba has alleged a breathtakingly bold theory according to which Pemex, its labor union, and the Commission--juridically separate entities--combined to effect sales of Mexican government-owned residual oil "off the books" of Pemex and into

Arriba's tanks at a much-reduced price. Presumably the goal of this alleged arrangement was to enrich the officials wily and corrupt enough to have concocted this rogues' bargain that depended for all practical purposes upon the theft of Mexico's oil products. But under § 1605(a)(2), Arriba first has to plead how Pemex achieved the jurisdictional nexus necessary to support subject matter jurisdiction in this country. Arriba has failed to allege a single Pemex activity in or directly affecting the United States. It bears repeating that the 1984 agreement was structured so as to avoid any direct dealings with Pemex, and that while the Agreement was allegedly executed in Texas, Pemex was not a party to it.[9] Arriba has not alleged that Pemex negotiated, participated or contracted with it directly in any way. The fact that Pemex has some commercial operations in or affecting the United States is inadequate to support a finding of subject matter jurisdiction under the FSIA. "The only relevant acts for purposes of jurisdiction under the FSIA are those acts that form the basis of the plaintiff's complaint." *Stena*, 923 F.2d at 387-888.

The only alleged connection between Pemex and Arriba in the United States relevant to this case (and hence "material" under *Stena, id.* at 387) arises from the Commission's status as an agent or alter ego of the Union and Pemex. Arriba insists that the Supreme Court's decision in *Bancec* supports finding jurisdiction predicated upon the attribution to Pemex of acts by the Commission and the Union. We wholeheartedly disagree that Arriba's theory of attribution is *Bancec's* theory.

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[9]Arriba did not seek to rest jurisdiction on § 1605(a)(3) of the FSIA, possibly because it could be contended that Arriba's alleged financial losses alone are irrelevant to measuring the effect of any commercial activities on the United States because Arriba is a Bahamian corporation. *Stena*, 923 F.2d at 390.

In *Bancec*, an official autonomous credit institution of the Cuban government sued First National (subsequently known as "Citibank") to recover an unpaid letter of credit. Bancec had been established as a separate juridical entity in 1960, with powers to hold and sell property and to sue and be sued. After the Cuban revolution, however, Bancec was dissolved and its capital was split between two government agencies. Citibank counterclaimed, asserting a right to set off the value of its seized Cuban assets. At issue on appeal was whether Bancec's claim was subject to setoff for the debts of its parent government. Answering in the affirmative, the Court held that while duly created instrumentalities of a foreign state are to be accorded a presumption of independent status, the presumption of judicial separateness may be overcome when "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Id.*, 462 U.S. at 629, 103 S.Ct. at 2601. Cuba therefore could not escape liability for violations of international law simply by retransferring assets to separate juridical entities. The Court found it inequitable to permit Cuba to sue on a claim in an American court while ignoring its obligations under international law. *Id.* at 630-34, 103 S.Ct. at 2602-04.

Bancec is inapposite to this case. First, the concept of piercing the corporate veil, or alter ego liability, that underlies *Bancec* involves the disregard of corporate status to reach the assets of the owners or of related corporate entities. *See, e.g., Hester*, 879 F.2d at 177-78 and n. 7. No such facts are pleaded here. Arriba wants the federal court to disregard the Commission's separate status by lumping it with an entirely distinct entity: the Union's employer, Pemex. There is neither common ownership nor any similar

legal relationship between these entities.[10] One cannot pierce a non-existent corporate veil. What Arriba seeks is more properly characterized as joint and several liability for conspiracy or tort, respondeat superior,[11] or agency liability.

Second, Arriba's agency theory is deficient. Just as *Bancec* "freely drew from American corporate law regarding the circumstances in which a corporation could be held not to be a separate entity from its owners," *Hester*, 879 F.2d at 177, these same concepts lead us to reject Arriba's claims that the private defendants were "agents" and "alter egos" of Pemex.[12] Arriba has failed to allege any manifestations *by*

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[10]In *Bancec*, both of the agencies that received assets of the former bank were government instrumentalities. Here, only Pemex is a sovereign entity. The Commission is the private contracting arm of the Union, which is itself a private entity.

[11]Arriba did not plead conspiracy or tort as a basis for FSIA jurisdiction, *see* 28 U.S.C. § 1605(a)(5) (FSIA exception to immunity for tort liability). Likewise, it cannot rest on respondeat superior, inasmuch as it asserts that the Commission's activities were outside the course and scope of employment with Pemex. No further discussion of these issues is warranted.

[12]*Bancec* "specifically declined to apply the law of the chartering state to determine the separate juridical status of its instrumentality." *Hester*, 879 F.2d at 177. It may seem incongruous for U.S. courts to import concepts from American corporate law to define the relationships between foreign governments and their instrumentalities, rather than to apply traditional choice of law principles. Indeed, one commentator has criticized this approach:

> Without exceptions the United States cases ... have applied the United States theory of veil piercing to determine the relationship of the foreign government and the instrumentality. The courts have not even addressed the choice of law as a possible issue. The law of the forum has been less a choice and more an

Pemex, the alleged "principal" in this agency relationship, that the private defendants could act *for* Pemex. It is undisputed that Pemex was not a party to the 1984 agreement with Arriba. Quinones purported to represent only the Commission, and not the Union or Pemex, when he signed the Agreement. Arriba's insistence that corruption in the Mexican oil industry continued despite President de la Madrid's "moral renovation" campaign, rendering moot the question of illegality under Mexican law, only undermines its assertion that an agency relationship existed between Pemex and the private defendants.

Arriba also pleads that while Union and Pemex officials represented informally to Arriba that they could arrange for Pemex to deliver substantial volumes of residual oil, "[n]one of those representations were true." This is a far cry from domestic agency principles, which require "some manifestations, written or spoken words or conduct, *by the principal*, communicated either to the agent (actual authority) or to the third party (apparent authority)." *Hester*,

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application without acknowledgement that a choice existed.

MICHAEL WALLACE GORDON, FOREIGN STATE IMMUNITY IN COMMERCIAL TRANSACTIONS § 6.18 at 6-46 (1991) [hereinafter "GORDON"]. However, the Court did qualify its holding in two important respects. First, *Bancec* warned against an overly mechanical application of American corporate law principles. 462 U.S. at 633-34, 103 S.Ct. at 2603. The Court did not presume to create "an exhaustive list of criteria for disregarding the corporate form of other sovereign states' instrumentalities." *Hester*, 879 F.2d at 178. More fundamentally, the Court justified its result as "the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law." *Bancec, id.*, 462 U.S. at 633-34, 103 S.Ct. at 2603.

879 F.2d at 181.[13] Yet there is here no allegation that Pemex, the "principal," participated in any of the negotiations leading to the Agreement or stated that any of the private defendants represented Pemex. The bottom line is that Arriba's pleadings reflect the *antithesis* of agency liability. Arriba cannot have it both ways. Having structured a transaction to avoid dealing with Pemex directly, it cannot now allege that Pemex is responsible for the acts of private parties who misrepresented their authority to act on Pemex's behalf.[14]

There is a third distinction between this case and *Bancec*. *Bancec* emphasizes "[d]ue respect for the actions taken by foreign sovereigns and for principles of comity between nations." 103 S.Ct. at 2600, citing *Hilton v. Guyot*, 159 U.S. 113, 163-64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895). The *Bancec* Court expressed the concern that freely ignoring the separate status of government instrumentalities could cause uncertainty over the extent of their liabilities and inhibit their ability to obtain credit. Hence, the separate corporate status of such entities should be disregarded only where necessary to do equity. We would be remiss not to point out that equity is not served by holding Pemex accountable in American courts on the broad but vague

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[13]*Hester* quotes *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 493 (5th Cir. 1974), *overruled on other grounds, Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03, 102 S.Ct. 2099, 2104-05, 72 L.Ed.2d 492 (1982), *as stated in Burstein v. State Bar of California*, 693 F.2d 511, 518 n. 12 (5th Cir. 1982) (emphasis added).

[14]It is true that in *Hester* the flaw in the plaintiff's agency theory of liability against the Nigerian government was determined after trial. 879 F.2d at 181. But Arriba's conclusory allegations of an agency relationship are contradictory to the facts it pleads, which assert a *misrepresentation* of the private defendants' ability to bind Pemex.

attribution theory alleged by Arriba. Not only does Arriba's theory fail to conform to the standard articulation of piercing the corporate veil, but it cannot be proved without massive, intrusive discovery in Mexico on highly sensitive domestic issues.[15] We would not allow such generalized conspiratorial allegations against an American government entity to provoke massive discovery. *See, e.g., Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985); and *Jacquez v. Procunier*, 801 F.2d 789 (5th Cir. 1986)(vague allegations of conspiracy). It is unimaginable that FSIA would authorize broader exposure to suit of a foreign government instrumentality such as Pemex than that of domestic governmental units.

[8] For these reasons, we hold that Arriba has not alleged commercial activities by or on behalf of Pemex, related to the Agreement, that subject it to jurisdiction in this country. While *Bancec* would permit FSIA jurisdiction in American courts over a commercial activity predicated upon principal-agent or veil-piercing allegations against a foreign sovereign instrumentality, *see Hester*, 879 F.2d at 181,

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[15]Arriba's discovery requests in the district court prove this point. They include: (1) requests for all Pemex financial reports, balance sheets and income statements, including those of Pemex's subsidiaries and affiliates; (2) all documents reflecting communications between Pemex and the private defendants, ranging from formal documents to internal memoranda; (3) all documents reflecting any payments or transfers of funds from Pemex, any vendor of Pemex, or any officer or director of Pemex, to the private defendants; (4) all documents in Pemex's possession reflecting communications between any of the private defendants--or persons associated with them-- and Pemex or its vendors; (5) all documents relating to any assets of the private defendants; (6) all documents referring to any of the activities of the private defendants; and (7) all documents referring to any investigations of the private defendants by Pemex for any alleged misconduct, including bribery, extortion, ultra vires acts, tax evasion, embezzlement and any other possible violations of U.S. or Mexican law.

Arriba's allegations do not meet the *Bancec* test. Fairly read, they are self-contradictory on the possibility of a principal-agent relationship between Pemex and the Commission or the Union, and they do not conform to the internationally recognized principles authorizing, under limited circumstances, disregard of corporate status. *Cf. Bancec,* 462 U.S. at 633-34, 103 S.Ct. at 2603. Judicial comity among nations, an important principle acknowledged in *Bancec*, has become increasingly important to today's global economy. Flouting comity, Arriba's *JFK*-like[16] charges against the defendants, if pursued in American courts, could seriously impede our relations with Mexico. Finally, because Arriba's allegations do not satisfy *Bancec*, permitting discovery will not cure the FSIA jurisdictional deficiency.[17] The allegations made by Arriba do not confer

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[16]Oliver Stone's recent movie *JFK* hypothesizes that President Kennedy was assassinated by a massive conspiracy including the CIA, FBI, the U.S. military-industrial complex, and various other government officials and businessmen.

[17]Arriba incorrectly relies on cases that have allowed limited discovery before the court rules on whether a foreign sovereign's commercial activities deprive it of immunity. In each of these cases, there were allegations of *specific facts* that, if proved, sustained a nexus between particularized commercial activity and the claims asserted by the plaintiff. The theft of trade secrets by a French government-owned company and its subsidiary was alleged in *Gould* to have been accomplished partly through negotiations in the United States with Gould's former employee. The court ordered limited discovery to ascertain that such actions, sufficient in its view to establish FSIA jurisdiction, had occurred. *Gould*, 853 F.2d at 453. In *Gilson*, allegations were made by an American plaintiff against the Republic of Ireland and companies owned by it that these defendants enticed him to go to Ireland to work for them and then stole his patent rights and expertise for their own benefit. *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C.Cir. 1982). Whether or not a Soviet entity negligently overhauled a Polish aircraft in the United States, contributing to its crash later in Poland, and whether two Soviet entities were separate, provided

jurisdiction over Pemex consistent with FSIA.

IV.
IMPLIED WAIVER OF SOVEREIGN IMMUNITY UNDER FSIA

[9] As another basis for jurisdiction under the FSIA, Arriba urges that Pemex implicitly waived its sovereign immunity, a possibility authorized by § 1605(a)(1). It goes nearly without saying that Pemex has not expressly waived immunity.

The gist of Arriba's implied waiver theory is as follows: Article 17 of the Organic Law of Petroleos Mexicanos, Pemex's enabling legislation, is the equivalent of a corporate charter. Article 17 permits Pemex "to sue and

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the only two fact issues pertaining to the commercial activities exception to FSIA in *Filus v. Lot Polish Airlines*, 907 F.2d at 1332-33. Finally, *Foremost-McKesson* permitted inquiry into whether the Iranian government's majority control of a dairy company in Iran was sufficient to establish a principal-agent relationship under the FSIA. 905 F.2d at 447.

There was alleged to be direct involvement by the foreign sovereign instrumentality in the commercial activity from which all of the foregoing claims arose. Liability was sought against the sovereign defendant on account of specific misdeeds. Arriba's allegations, as we have emphasized, posit no direct involvement of Pemex in its contract. Its complaint relies on speculative inferences of behind-the-scenes activity by Pemex and, through its novel use of corporate attribution theory, would hold Pemex liable for the Union's and the Commission's misdeeds. Limited jurisdictional discovery, consonant with the comity envisioned by FSIA, *(See Gould*, 853 F.2d at 451; *Foremost*, 905 F.2d at 446-47 is impossible under these allegations, because they are much broader than the basic claim of breach of the 1984 Agreement. As the other FSIA cases demonstrate, discovery may be used to confirm specific facts that have been pleaded as a basis for enforcing the commercial activities exception, but it cannot supplant the pleader's duty to state those facts at the outset of the case. *Stena*, 923 F.2d at 386-87.

be sued."[18] A long line of Supreme Court decisions, beginning with *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. (22 U.S.) 904, 6 L.Ed. 244 (1824), have construed the "sue and be sued" provisions in corporate charters to be a waiver of sovereign immunity. Thus, Arriba argues, Article 17 amounts to an implied waiver of Pemex's sovereign immunity.

If adopted, Arriba's imaginative "sue and be sued" theory of implied waiver would presumably deny Pemex sovereign immunity in most if not all future actions to which it is a party. We decline to adopt the theory.[19] As Chief Justice Marshall noted in *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738, 6 L.Ed. 204 (1824), the companion case to *Planters' Bank*, the legislation which created the Bank of the United States empowered it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United

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[18]These are Arriba's words; the phrase "sue or be sued" does not actually appear in Article 17, which provides that Mexico's federal courts have exclusive jurisdiction over all cases and controversies to which Pemex is a party.

[19]According to Professor Gordon, the argument that endowing a state entity with the capacity to sue and be sued constitutes an implicit waiver of sovereign immunity is "easily rejected." GORDON § 9.04 at 9-9 (citing *Dayton v. Czechoslovak Socialist Republic*, 672 F.Supp. 7 (D.D.C. 1986), *affirmed*, 834 F.2d 203 (D.C.Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S.Ct. 2820, 100 L.Ed.2d 921 (1988)). Section 1604 of the Act extends sovereign immunity not just to the governments of foreign states, but to their agencies and instrumentalities. Observing that the legislative history to § 1603(b) defines "agency or instrumentality" to include any entity which, "under the law of the foreign state where it was created, can sue or be sued in its own name," *Dayton* held that such entities are covered by § 1604. *Id.* at 10-11.

States."[20] But *Planters' Bank* has no bearing on the issue of whether *foreign* sovereigns are immune from suit in the courts of the United States. The case, which settled a lingering dispute over the powers of the Bank of the United States, held that the "sue and be sued" language in the Bank's charter gave it the right to sue in federal court as the bearer of negotiable instruments made by a state bank. *Planters' Bank* turned on whether Congress had conferred federal question jurisdiction on the Bank, not whether the particular words "sue and be sued" amounted to a waiver of the Bank's sovereign immunity as a federally chartered institution.[21]

Nor is *Bancec* helpful to Arriba. Arriba refers to an isolated passage in *Bancec* in which the Court, citing *Planters' Bank*, noted that "[p]rovisions in the corporate charter stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities, thereby enabling third parties to deal with the instrumentality knowing that

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[20]*See generally* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 967-84 (3d ed. 1988).

[21]*Planters' Bank* and *Osborn* did not address sovereign immunity within the context of international law. Recently, however, the Court in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983), raised the question whether the FSIA is unconstitutional to the extent that it permits the federal courts to entertain substantive claims that are not based on federal law. Relying on *Osborn*, the Court held that the phrase "arising under the laws of the United States" in Article III is sufficiently broad to entitle Congress to "confer on the federal courts jurisdiction over any case or controversy that *might* call for the application of federal law." *Id.* at 492, 103 S.Ct. at 1971 (emphasis added). Defining the scope of federal question jurisdiction cannot answer the separate question whether Pemex's charter amounts to an implied waiver of its immunity from suit in U.S. courts.

they may seek relief in the courts." 462 U.S. at 625, 103 S.Ct. at 2599. In this particular context, however, the "waiver" of sovereign immunity referred to the Cuban government's willingness to allow *some* judicial remedies against the bank, as opposed to the more specific question of whether Bancec should be exposed to the subject matter jurisdiction of courts in the United States. To the extent that Article 17 provides that Pemex may be sued, it amounts to a waiver of Mexico's sovereign immunity within the meaning of the above-quoted passage in *Bancec*. But Article 17 also gives Mexican courts exclusive jurisdiction over all controversies to which Pemex is a party. Consequently, Pemex's enabling legislation, without more, is hardly a waiver of its sovereign immunity within the meaning of the FSIA.[22]

V.
CONCLUSION

In view of our holding that the district court lacks subject matter jurisdiction over this dispute, it is unnecessary to decide whether Arriba's action against Pemex is barred by the Act of State doctrine. For all the foregoing reasons, the judgment of the district court is REVERSED with instructions to DISMISS with prejudice; the Act of state interlocutory appeal is DISMISSED as moot.

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[22]According to the House Report that accompanied the FSIA, implicit waivers are ordinarily found in three situations: (1) a foreign state agrees to arbitration in another country; (2) the foreign state agrees that a contract is governed by the laws of a particular country; and (3) the state files a responsive pleading without raising the immunity defense. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. at 18. *See also* GORDON § 9.04 at 9-10. None of these situations is present here.

Case No. 91-2180--REVERSED with INSTRUCTIONS to DISMISS with PREJUDICE.

Case No. 91-6311--DISMISSED AS MOOT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
JAN 28 1991
Jesse E. Clark, Clerk
By Deputy: /s/K. Sanders

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARRIBA LIMITED,	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-89-2442
PETROLEOS MEXICANOS,	§	
a/k/a Pemex,	§	
Defendant.	§	

ORDER

On November 2, 1990 the Court heard oral argument on Pemex's motion to dismiss. The Court is of the opinion that Pemex's motion should be denied for the following reasons:

I. Pemex's act of state doctrine argument.

Pemex attempts to argue that in light of the act of state doctrine the Court must refrain from deciding whether Pemex is liable to Arriba under the allegedly illegal contracts entered into by the parties. Pemex bases its argument on an opinion letter of the Attorney General of Mexico written in response to Pemex's inquiry concerning the validity of the contracts. The opinion states that the effect of the regulations and statutes enacted by the Mexican

administration to govern the sale of oil is to render the contracts illegal; thus, Arriba cannot recover from Pemex based on the agreements.

Pemex cites James P. D'Angelo v. Petroleos Mexicanos, 422 F. Supp. 1280 (D.Del 1976), affirmed without opinion, 564 F.2d 89 (3rd Cir. 1977), cert. denied, 434 U.S. 1035 (1978) in support of its argument that the opinion letter represents an official declaration of an act of state. In D'Angelo, the Court holds that the Attorney General of Mexico's opinion must be accepted as an "official declaration" by the Mexican government on the scope and effect of a particular expropriation decree. The Court reaches this conclusion after considering the structure of the Mexican government, the propriety of the request for the opinion, and the nature of the particular decree.

This Court does not agree with Pemex's assertion that a court is required to find that an opinion letter written by the attorney general represents an official act of state. After acknowledging that the expropriation decree represented an official act of state, the D'Angelo court then considered whether the Attorney General was the proper official to render an official declaration on the scope and effect of that statute.

In the case at hand, the Court must determine whether the regulations and statutes governing contracts for oil represent official acts of state which bear on the issues in this lawsuit. The Court may then determine that the Attorney General's opinion represents an official declaration on the scope and effect of these statutes. Because the Court has not yet decided these questions, Pemex's argument that the act of state doctrine bars the Court from considering Arriba's claim against Pemex lacks merit.

II. Pemex's Foreign Sovereign Immunities Act argument.

Pemex argues that, as a decentralized agency of the government of Mexico, it is entitled to sovereign immunity under the Foreign Sovereign Immunities Act of 1976. 28 U.S.C. §§ 1330, 1602-1611 ("FSIA"). Under the statute, Pemex is entitled to immunity from the jurisdiction of the United States and of the States unless its activities fall within one of three statutory exceptions. The Fifth Circuit has held that the party claiming immunity bears the burden of proving that its activities do not fall within one of the statutory exceptions. Vencedora Oceania Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 199 (5th Cir. 1984).

This Court is of the opinion that Pemex has failed to establish that its activities do not fall within the commercial activity exception to the FSIA. Pemex attempts to argue that because Pemex's employees engaged in the activities at the heart of this lawsuit, the alleged commercial activities cannot be attributed to Pemex, and the exception does not apply. However, the nature of the relationship between Pemex and those who allegedly engaged in illegal acts not yet been decided.

Further, the Supreme Court has held that in deciding whether a government instrumentality or employee has a separate legal status from the foreign state, the courts are to apply equitable principles to assure that "fraud and injustice" do not result. First National City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 103 S.Ct. 2591, 2601-03 (1983). Because Pemex has not established that its activities do not fall within the commercial activity exception to immunity under the FISA, it is hereby ORDERED that Pemex's motion to dismiss is DENIED. It is further

ORDERED that Pemex's motion for reconsideration (entry #14) is DENIED. It is further

ORDERED that Pemex's motion for certification of interlocutory appeal (entry #25) is DENIED. It is further

ORDERED that Pemex's conditional motion for protection is DENIED. It is further

ORDERED that Plaintiff's motion to impose sanctions is DENIED. It is further

ORDERED that Pemex's motion for enlargement of time (entry #46) is DENIED. It is further

ORDERED that Pemex's motion to strike is DENIED.

The Court makes the following rulings in CV90-1767, which has been consolidated with CV89-2442:

It is hereby ORDERED that Sindicato de Trabajadores Petroleros de la Republica Mexicana's motion to dismiss (entry #6) is DENIED. It is further

ORDERED that Pemex's motion for protective order (entry #12) is DENIED. It is further

ORDERED that Pemex's alternative motion for a more definite statement (entry #13) is DENIED.

Signed this 22nd day of January, 1991 at Houston, Texas.

/s/ Norman Black
NORMAN W. BLACK
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 13 1990
Jesse E. Clark, Clerk
By Deputy: /s/illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARRIBA, LIMITED,	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-89-2442
PETROLEOS MEXICANOS,	§	
a/k/a Pemex,	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before the court are the following in the above-captioned and numbered cause:

1) Pemex's Motion to Dismiss and to Quash Writs of Garnishment (#5), response (#8), and the reply of Pemex (#11); and

2) Pemex's Motion for Protective Order and for an Order Regulating Discovery (#6).

For the reasons set forth below, the motion to dismiss is continued. The Court will allow limited discovery on the issue of sovereign immunity alone.

On April 23, 1986, in an action in the 281st Judicial District Court of Harris County, Texas,[1] Plaintiff Arriba, Limited ("Arriba"), obtained a final judgment against six defendants ("judgment defendants") in that case. Pemex was not a party to that action and, therefore, the aforementioned final judgment. In June, 1989, Arriba filed its Application for Writ of Garnishment After Judgment in state court, seeking garnishment against Pemex in an attempt to obtain satisfaction of the final judgment.[2] Arriba served Pemex with two writs of garnishment. On July 24, 1989, Pemex removed the case to this Court. Pemex moves to dismiss, asserting that, as an agency or instrumentality of a foreign state, it is entitled to sovereign immunity under The Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C.A. § 1602-11 (West Supp. 1989), from the garnishment which Arriba seeks. Arriba's position is that Pemex is indebted to some or all of the judgment defendants, and that, because of this alleged indebtedness, Arriba is entitled to garnish assets of Pemex.

This Court is presented with the interesting question of whether the FSIA provides Pemex with the kind of immunity it asserts as the basis for invoking this Court's jurisdiction. The FSIA is the exclusive basis for federal jurisdiction over foreign states or their instrumentalities. Goar v. Compania Peruana de Vapores, 688 F.2d 417 (5th Cir. 1982). As Pemex has correctly pointed out, the FSIA permits garnishment of the assets of an instrumentality of a foreign state only to satisfy a judgment against the instrumentality. The property of foreign states "may be

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[1] Cause No. 85-35446.

[2] Response at 2.

levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C.A. § 1602 (West Supp. 1989) (emphasis added).

Furthermore, the provisions of the FSIA specifically concerning garnishment of the property of a foreign state indicate that such garnishment is permitted only to enforce a judgment against the state. Section 1609 generally provides for immunity from attachment procedures unless an exception found in section 1610 or section 1611 applies. Section 1610 is the principal provision establishing exceptions to the general rule of immunity of section 1609. Section 1610, however, only concerns satisfaction of judgments rendered against the foreign state. See H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 28-29, reprinted in 1976 U.S. Code Cong. & Admin. News 6627-28.[3] Since the final judgment in Cause No. 85-35446 in state court did not involve Pemex, the provisions of the FSIA excepting property of foreign states from immunity are not expressly available to Arriba, and the general rule of immunity found in section 1609 would appear to be controlling. Therefore, Arriba's attempt to garnish Pemex solely because Pemex is allegedly indebted to some or all of the judgment defendants is meritless.

Arriba, however, requests that it be allowed to conduct discovery on the issue of waiver and the exception to immunity from garnishment based upon the Supreme Court's decision in First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 103 S. Ct. 2591 (1983) (hereinafter Bancec). In Bancec, the Cuban bank of the same name brought suit against Citibank to collect on a letter of credit issued in its favor. Citibank counterclaimed, arguing

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[3] Section 1610 applies to attachments, garnishments, and supplemental proceedings available under applicable federal or state law to obtain satisfaction of a judgment. Id.

that it was entitled to set-off amounts due it as a result of the expropriation of its assets in Cuba by the Cuban government. On the basis of the peculiar facts before it, the Supreme Court opted not to heed the general rule of recognizing separate juridical entities of different foreign agencies or instrumentalities. Rather, the Supreme Court allowed the set-off, holding that the presumption of separateness had been overcome, and that Cuba should not be allowed to "escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities." Id. at 2603; see also De Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984).

In Bancec, therefore, the Supreme Court fashioned a limited exception to the otherwise applicable notion that execution procedures against an agency of a foreign state are not available to satisfy judgments against another agency of that state, assuming some other exception to the section 1609 general rule of immunity is likewise demonstrated. Arriba has requested time to conduct discovery on the issue of sovereign immunity. Pemex has moved for a protective order. Due to the fact that this case was removed on July 24, 1989, relatively recently, and in the interests of justice, the Court will allow limited discovery on the issue of sovereign immunity. All other discovery is stayed pending a ruling on the motion to dismiss, in accordance with filing dates set forth below.

In accordance with the foregoing, it is

ORDERED that Pemex's Motion to Dismiss and to Quash Writs of Garnishment is hereby CONTINUED. It is further

ORDERED that the parties may conduct limited discovery on the issue of sovereign immunity. It is further

ORDERED that all other discovery is hereby STAYED pending a ruling on Pemex's motion to dismiss. It is further

ORDERED that Arriba may file an amended response to Pemex's motion to dismiss on or before May 1, 1990. It is further

ORDERED that Pemex may file a reply to Arriba, Limited's amended response on or before twenty days following the filing date of Arriba, Limited's amended response.

Signed this 12th day of March, 1990.

/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

FOREIGN SOVEREIGN IMMUNITIES ACT, 28 U.S.C. §§ 1330, 1441(d) & 1602-1611

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1441. Actions removeable generally

* * *

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b)

of this chapter may be enlarged at any time for cause shown.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions.

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or

other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1882(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have

been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter

proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for

punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until

the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International

Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
JUL 16 1990
Jesse E. Clark, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARRIBA, LIMITED,	§	
Plaintiff	§	
	§	
VS.	§	C.A. NO. H-89-2442
	§	
PETROLEOS MEXICANOS,	§	
a/k/a Pemex,	§	
Defendant.	§	

FIRST AMENDED COMPLAINT

Plaintiff Arriba, Limited ("Arriba") hereby amends its complaint against Petroleos Mexicanos a/k/a Pemex ("Pemex"). This amendment is made pursuant to Rule 15(a), Fed.R.Civ.P., which permits Arriba to amend its complaint as a matter of course at any time before Pemex serves a responsive pleading.

Parties

1. Plaintiff Arriba is a Bahamian corporation. Its principal place of business is in Texas.

2. Defendant Pemex is a Mexican corporation, owned by the United Mexican States. Its principal office is in Mexico City. Pemex has been served and has appeared in this suit through its attorneys.

Jurisdiction

3. Because the United Mexican States owns a majority of the ownership interest in Pemex, Pemex is an "agency or instrumentality of a foreign state" under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1603(b). As such, it is also a "foreign state" under 28 U.S.C. § 1603(a). This Court thus has subject-matter jurisdiction under 28 U.S.C. § 1330(a).

4. Pemex is not immune from suit under the FSIA, for the following reasons:

--(a) Pemex has waived its immunity, either explicitly or by implication. 28 U.S.C.§§ 1605(a)(1), 1610(a)(1), 1610(b)(1).

--(b) This case is based upon a commercial activity carried on by Pemex in the United States; or upon acts performed in the United States in connection with Pemex's commercial activities elsewhere; or upon acts outside the United States in connection with Pemex's commercial activities elsewhere, which acts have caused direct effects in the United States. 28 U.S.C.§§ 1605(a)(2), 1610(a)(2), 1610(b)(2).

5. Because this suit is based in part upon the Racketeer Influenced and Corrupt Organizations Act, 15 U.S.C. § 1961 *et seq.*, this Court has subject-matter jurisdiction under 18 U.S.C. §1964(c) and 28 U.S.C. §1331.

6. This Court has jurisdiction over the claims based upon state law, by virtue of the doctrine of pendent jurisdiction.

Venue

7. Venue in this Court is proper under 28 U.S.C. § 1391(b), 28 U.S.C. §1391(f) and 18 U.S.C. §1965(a).

Factual context

8. Pemex is the Mexican oil company. Its activities are inextricably integrated with those of two other related entities -- Sindicato de Trabajadores Petroleros de la Republica Mexicana ("Sindicato," which is the petroleum workers union) and Comision de Contratos del Sindicato de Trabajadores Petroleros de la Republica Mexicana ("Comision," which is Sindicato's commission of contracts).

9. The relationship among Pemex, Sindicato and Comision is far closer than union-management relationships known in the United States. A very substantial portion of Pemex's business is actually tendered to Sindicato, which in turn channels many of those opportunities through Comision. Other opportunities are channeled through Grupo Serbo and related entities controlled by Joaquin Hernandez Galicia ("Hernandez," Sindicato's acknowledged leader for thirty years) and Sergio Bolanos ("Bolanos," Sindicato's financial trustee). Those entities may also have been controlled in part by Diaz Serrano, former director general of Pemex.

10. Pemex, Sindicato and Comision often serve as agents for one another. They make promises and representations for one another. They stand behind one another's contracts. The business of each is structured so that it is necessarily dependent upon the cooperation of the others.

11. In 1984, Bill Flanigan (later the president of Arriba) met with persons who were acting as the agents and representatives of Comision, Sindicato and Pemex. Their meetings concerned the sale of Pemex's residual oil, or "slop oil."

12. At the request of those agents, Flanigan arranged for the incorporation of a company under the law of The Bahamas. That company is the plaintiff, Arriba. Sindicato suggested The Bahamas as a desirable location for the incorporation of Arriba because of the Sindicato's own banking relationships there.

13. As a result of these discussions, Arriba entered a written Agreement with Comision in October 1984. Under that Agreement, Comision agreed to sell to Arriba a minimum of 6 million net barrels of Pemex's residual oil. The Agreement was signed in Houston, and it contained the following choice-of-law and choice-of-forum provision:

> 17.02 This Agreement shall be governed by the laws of the State of Texas, and all suits brought on this Agreement shall be brought in a court of competent jurisdiction in Harris County, Texas.

Later amendments did not change this provision. Ramiro Quinones Fabela ("Quinones") signed the contract on behalf of Comision, after presenting proof that he had been authorized to act as its attorney-in-fact. He also represented to Arriba that Pemex and the Sindicato would in fact make Pemex's residual oil available for sale to Arriba. Press reports in Mexico confirmed that in fact Sindicato had been given the rights to market Pemex's residual oil.

14. In reliance upon the representations and promises made by Quinones and his associates, Arriba successfully contracted to resell the residual oil at a substantial profit.

15. Beginning in November 1984, Quinones and his associates demanded payments from Arriba, to be used to pay Pemex and Sindicato officials to perform the Agreement. Arriba refused to pay.

16. On many other occasions, Quinones demanded extortionate payments to give Pemex and Sindicato an incentive to perform the Agreement. Again and again, Arriba refused.

17. Comision, Sindicato and Pemex have used similar extortionate tactics in slop oil dealings with and through other companies. On information and belief, those companies include Hi-Tech Exports, Tymco Ltd., Ammexo Industries and BMR Enterprises. On information and belief, Comision, Sindicato and Pemex have not honored their obligations to any of those companies.

18. On two occasions, Arriba's president was physically assaulted by Quinones and his companions for resisting their extortionate demands and for stating that Arriba was prepared to sue in order to enforce its lawful rights under the Agreement.

19. In 1985, Sindicato officials met with Flanigan on several occasions to assure Arriba that Pemex, Sindicato and Comision would see that the Agreement would be performed. Flanigan was even taken to sample the oil at Pemex's Minatitlan refinery, so that Arriba could prepare for delivery and resale.

20. Comision did not perform its obligations under the Agreement with Arriba. Comision continually affirmed those obligations, but it did not perform them. Similarly, Sindicato affirmed that it stood behind the Agreement and that it would ensure performance, but it did not do so.

21. Flanigan and others met with Hernandez, the head of Sindicato. Hernandez affirmed that Pemex had given Sindicato permission to sell the residual oil, and that it would be delivered to Arriba. That did not happen. At the time, Hernandez enjoyed the power and prerequisites of a high-ranking Mexican governmental official. In fact, he ran Pemex, along with its director general.

22. In the summer of 1985, Arriba sued Sindicato, Comision, Jose Sosa ("Sosa"), Victorino Lopez Reyes ("Lopez"), Carlos Manuel, Vasconcelos Guevara ("Vasconcelos"), and Quinones in the 281st District Court of Harris County, Texas. On April 3, that court entered a judgment ("the 1986 Judgment") against each of those defendants. Sindicato, Comision, Lopez, Sosa and Vasconcelos entered a general appearance through the law firm of Pena & Flores.

23. The 1986 Judgement held Sindicato and Comision jointly and severally liable for $37.266 million, for breach of contract and attorney fees. In addition, Sindicato, Comision, Sosa, Lopez, Vasconcelos and Quinones were held jointly and severally liable for $55 million, for conspiracy and punitive damages.

24. In 1987, Arriba took steps to collect the 1986 Judgment. One such step was the filing of a petition for a writ of garnishment against Pemex. Another step was the attachment of valuable artifacts, jewelry and gold being stored by Lopez in a McAllen bank.

25. In response to Arriba's legitimate efforts to collect its valid 1986 Judgment, Comision, Sindicato, Pemex and others set up a new Bahamian corporation with the name "Arriba" (that is, the same name as the plaintiff's). They then instructed that new bogus entity to sue Arriba to enjoin it from enforcing Arriba's valid judgement, which the new entity falsely alleged to belong to it. That suit was an obvious sham, designed to mislead and defraud the courts.

26. In late 1987, representatives of Sindicato and Pemex entered into settlement discussions with representatives of Arriba. A settlement of the judgment and ancillary proceedings was made, in the form of a written contract between Arriba and Comater, S. de R.L. ("Comater"). Comater was a new Mexican corporation formed by Comision, Sindicato, Pemex and others.

27. The contract between Arriba and Comater was a 10-year Joint Venture Agreement. Under that contract, Arriba and Comater formed a joint venture to ship, refine, market and sell residual oil delivered to Comater by Pemex. Comater promised to deliver to the joint venture at least 30 percent of the residual oil supplied to it by Pemex. Moreover, until the first delivery of residual oil, Comater agreed to pay Arriba half of the income from the operation of three drilling rigs for Pemex. Comater was under the absolute and total control of Pemex and Sindicato, as all parties freely acknowledged and understood.

28. Representatives of Sindicato and Pemex represented to Arriba that they would in fact arrange for Pemex to deliver substantial volumes of residual oil to Comater. They also represented to Arriba that they would in fact arrange for Comater to operate three drilling rigs for Pemex. None of these representations were true, and there was no performance under the Joint Venture Agreement.

29. In exchange for the contract with Comater, Arriba released the 1986 Judgment debtors and Pemex. Arriba would not have released the 1986 Judgment but for the false representations made by Pemex and Sindicato.

30. In February 1989, Arriba filed suit to rescind the release of the 1986 Judgment and to enter a new judgment. In April 1989, Arriba recovered a judgment ("the 1989 Judgment") for fraud against Sindicato, Comision, Sosa, Lopez, Vasconcelos and Quinones. The 1989 Judgment reinstated the 1986 Judgment. In addition, it held Sindicato, Comision, Sosa, Lopez, Vasconcelos and Quinones jointly and severally liable for an additional $180.75 million.

31. The total amount owing to Arriba under the 1986 Judgment and the 1989 Judgment is over $273 million, plus post-judgment interest at 10 percent per year.

32. In June 1989, Arriba served two writs of garnishment upon Pemex, in an attempt to obtain satisfaction of its outstanding judgments against the judgment debtors.

33. In the months since June 1989, representatives of Sindicato have represented to Arriba that Pemex has been stripping the assets of Sindicato, motivated at least in part by the desire to frustrate Arriba's enforcement of its judgments against Sindicato. Because the judgment debtors' assets and business opportunities all involve the oil and gas business in Mexico, on information and belief their assets must to some extent now be under the control of Pemex.

34. Representatives of Sindicato have threatened that the president of Arriba would be indicted in Mexico if Arriba pursues additional legal action.

35. Over a period of several years, Pemex and others have engaged in a widespread pattern of racketeering activity. That activity includes the following:

- For the purpose of executing schemes to defraud and to obtain money by false representations and promises, representatives of Pemex have used the mails and interstate and telephone communications. See 18 U.S.C. §§ 1341, 1343 (mail fraud and wire fraud).

- Representatives of Pemex have knowingly used intimidation and threats with intent to induce persons not to present testimony at an official proceeding. See 18 U.S.C. § 1512(a)(tampering).

- Representatives of Pemex have knowingly engaged in misleading conduct with intent to induce persons not to present testimony at an official proceeding. See 18 U.S.C. § 1512(a)(tampering).

- Representatives of Pemex have obstructed commerce by extortion, attempts to extort and conspiracies to extort. See 18 U.S.C. § 1951(obstruction of commerce).

- Representatives of Pemex have traveled in foreign commerce and used facilities in interstate and foreign commerce, with intent to promote and carry on extortion. See 18 U.S.C. § 1952(unlawful travel).

- With intent to deprive the owner of property, representatives of Pemex have appropriated, and attempted to appropriate, that property without the owner's effective consent. See Tex. Penal Code chapter 31 (theft by extortion).

First Claim
(post-judgment garnishment)

36. Arriba obtained a judgment on April 4, 1989, in cause number 89-07592 in the 281st Judicial District Court of Harris County, Texas, against Sindicato, Comision, Sosa, Lopez, Vasconcelos and Quinones. That judgment ("the 1989 Judgment") is in all things final, valid and subsisting, and it is wholly unsatisfied.

37. The 1989 Judgment, inter alia, revived the judgment that Arriba had obtained on April 23, 1986, in cause number 85-35446 in the 281st Judicial District Court of Harris County, Texas, against Sindicato, Comision, Sosa, Lopez, Vasconcelos and Quinones. That judgment ("the 1986 Judgment") is in all things final, valid and subsisting, and it is wholly unsatisfied.

38. Within Arriba's knowledge, the judgment debtors under the 1989 Judgment and under the 1986 Judgment do not possess property in Texas subject to execution sufficient to satisfy either of these judgments.

39. On June 19, 1989, in response to the sworn petitions filed by Arriba to begin this consolidated proceeding, the District Clerk for the 281st Judicial District Court of Harris County, Texas, issued Writs of Garnishment After Garnishment to Pemex as garnishee, commanding Pemex not to pay any of the judgment debtors pending further court order. Those writs remain in effect.

40. Arriba believes that Pemex is indebted to the judgment debtors, or has in its possession money, property or effects belonging to them.

41. Arriba is entitled to judgment against Pemex as garnishee in a sum sufficient to satisfy the 1986 Judgment and the 1989 Judgment.

Second Claim
(RICO -- §1962(a))

42. Under 18 U.S.C. § 1962(a), it is unlawful for any person who has received income from a pattern of racketeering activity to use that income in the operation of an enterprise whose activities affect foreign commerce. Under 18 U.S.C. § 1964(c), any person injured in his business or property by a violation of section 1962(a) may sue to recover threefold his damages and the cost of suit, including a reasonably attorney fee.

43. Pemex has received income from a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion -- and it has used that income in the operation of Pemex, the Sindicato and Comision, all of which are enterprises whose activities affect commerce between the United States and Mexico. Arriba has been injured by this conduct in its business or property.

Third Claim
(RICO - § 1962(b))

44. Under 18 U.S.C. § 1962(b), it is unlawful for any person through a pattern of racketeering activity to maintain control of any enterprise whose activities affect foreign commerce. Under 18 U.S.C § 1964(c), any person injured in his business or property by a violation of section 1962(b) may sue to recover threefold his damages and the cost of suit, including a reasonable attorney fee.

45. Through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion -- Pemex has maintained control over Pemex, the Sindicato and Comision, all of which are enterprises whose activities affect commerce between the United States and Mexico. Arriba has been injured by this conduct in its business or property.

Fourth Claim
(RICO -- § 1962(c))

46. Under 18 U.S.C. § 1962(c), it is unlawful for any person associated with an enterprise whose activities affect foreign commerce to conduct the enterprise's affairs through a pattern of racketeering activity. Under 18 U.S.C. § 1964(c), any person injured in his business or property by a violation of section 1962(c) may sue to recover threefold his damages and the cost of suit, including a reasonable attorney fee.

47. Pemex is associated with Sindicato and Comision, enterprises whose activities affect commerce between the United States and Mexico. Pemex conducts Sindicato's and Comision's affairs through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion. Arriba has been injured by this conduct in its business or property.

48. Pemex and others have joined together to form an association-in-fact enterprise, an ongoing organization whose members function as a continuing unit, with an existence separate and apart from any pattern of racketeering. Pemex is associated with the association-in-fact enterprise, the activities of which affect commerce between the United States and Mexico. Pemex participates in the enterprise's

affairs through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion. Arriba has been injured by this conduct in its business or property.

Fifth Claim
(RICO -- § 1962(d)

49. Under 18 U.S.C. § 1962(d), it is unlawful for any person to conspire to violate subsection (a), (b) or (c) of section 1962.

50. Under 18 U.S.C. § 1964(c), any person injured in his business or property by a violation of section 1962(d) may sue to recover threefold his damages and the cost of suit, including a reasonable attorney fee.

51. Pemex has conspired with Comision, Sindicato, Hernandez, Bolanos, Lopez and others to violate 18 U.S.C. § 1962(a), (b) and (c).

Sixth Claim
(alter ego)

52. Comision, Sindicato and Comater are alter egos of Pemex.

53. Comision was organized and has been operated as a mere tool or business conduit of Pemex. Sindicato was organized and has been operated as a mere tool or business conduit of Pemex. Comater was organized and was operated as a mere tool or business conduit of Pemex. All of the business opportunities of Comision, Sindicato and Comater originate with Pemex. As an obvious example, Pemex exercised dominion and control over the residual oil sold to Arriba by Comision and by Comater. Comision, Sindicato,

Comater and Pemex disregard the separateness of their corporate entities, and they lead others to do so.

54. Pemex is liable to Arriba for the damage caused by (a) Comision's breach of the Agreement of October 1984, as amended, (b) Comision's failure to pay the 1986 Judgment, (c) Comision's deception in procuring the release of the 1986 Judgment, and (d) Comision's failure to pay the 1989 Judgment.

55. Pemex is liable to Arriba for the damage caused by (a) Sindicato's breach of the Agreement of October 1989, as amended, (b) Sindicato's failure to pay the 1986 Judgment, (c) Sindicato's deception in procuring the release of the 1986 Judgment, and (d) Comision's failure to pay the 1989 Judgment.

56. Pemex is liable to Arriba for the damage caused by Comater's failure to perform the Joint Venture Agreement of 1987.

Seventh Claim
(sham to perpetrate fraud)

57. The fiction of Comision's separateness from Pemex has been used as a means of perpetrating actual and constructive fraud. The fiction of Sindicato's separateness from Pemex has been used as a means of perpetrating actual and constructive fraud. The fiction of Comater's separateness from Pemex has been used as a means of perpetrating actual and constructive fraud. Honoring the separateness of these entities would work injustice and inequity.

58. Pemex is liable to Arriba for the damage caused by (a) Comision's breach of the Agreement of October 1984, as amended, (b) Comision's failure to pay the 1986 Judgment, (c) Comision's deception in procuring the release of the 1986 Judgment, and (d) Comision's failure to pay the 1989 Judgment.

59. Pemex is liable to Arriba for the damage caused by (a) Sindicato's breach of the Agreement of October 1989, as amended, (b) Sindicato's failure to pay the 1986 Judgment, (c) Sindicato's deception in procuring the release of the 1986 Judgment, and (d) Comision's failure to pay the 1989 Judgment.

60. Pemex is liable to Arriba for the damage caused by Comater's failure to perform the Joint Venture Agreement of 1987.

Eighth Claim
(agency)

61. Comision has acted as the agent of Pemex.

62. Pemex is liable to Arriba for the damage caused by Comision's conduct in (a) breaching the Agreement of October 1984, as amended, (b) failing to pay the 1986 Judgment, (c) deceiving Arriba to procure the release of the 1986 Judgment, and (d) failing to pay the 1989 Judgment.

63. Sindicato has acted as the agent of Pemex.

64. Pemex is liable to Arriba for the damage caused by Sindicato's conduct in (a) breaching the Agreement of October 1984, as amended, (b) failing to pay the 1986

Judgment, (c) deceiving Arriba to procure the release of the 1986 Judgment, and (d) failing to pay the 1989 Judgment.

Ninth Claim
(fraudulent transfer)

65. The transfer of assets from Comision and Sindicato to Pemex constitutes a fraudulent transfer. That transfer was made with the actual intent to hinder, delay or defraud Arriba as judgment creditor under the 1986 Judgment and the 1989 Judgment.

66. Moreover, that transfer was made by Comision and Sindicato without receiving a reasonably equivalent value in exchange, and Comision and Sindicato were insolvent or became insolvent as a result.

67. As the creditor of Comision and Sindicato, Arriba is entitled to (a) avoidance of the transfer to Pemex to the extent necessary to satisfy Arriba's claims, (b) an injunction against further disposition by Pemex of the transferred assets, and (c) execution on the assets transferred or their proceeds.

Jury Demand

68. Plaintiff hereby demands trial by jury on all issues.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that upon final hearing this Court enter judgment against Pemex and award to Arriba the following damages and relief:

(a) judgment against Pemex as garnishee in a sum sufficient to satisfy the 1986 Judgment and the 1989 Judgment,

(b) monetary damages for threefold the damages caused by Pemex's violations of 18 U.S.C. § 1962, plus the cost of suit (including a reasonable attorney's fee),

(c) monetary damages against Pemex in the amounts owed to Arriba by Comision, Sindicato and Comater,

(d) avoidance of all transfers from Comision and Sindicato to Pemex, to the extent necessary to satisfy Arriba's claims against them,

(e) an injunction against further disposition of assets by Pemex until Arriba's claims against Comision and Sindicato have been satisfied,

(f) an order permitting Arriba to levy execution on assets transferred from Comision and Sindicato (and proceeds from those assets),

(g) prejudgment and postjudgment interest in the maximum amounts allowed by law, and

(h) all other relief in law and equity to which Arriba may show itself to be justly entitled.

Respectfully submitted,

/s/ Mike O'Brien /by permission JM
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served by hand delivery on the following counsel of record on this 16 day of July, 1990, addressed as follows:

Kenneth R. Wynne
Bracewell & Patterson
2900 South Tower
Pennzoil Place
Houston, Texas

/s/ Wm. H. White
William H. White

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States District Court
Southern District of Texas
FILED
MAY 31 1990
Jesse E. Clark, Clerk

ARRIBA, LIMITED,	§	
Plaintiff,	§	
	§	
v.	§	
	§	
PETROLEOS MEXICANOS	§	
a/k/a PEMEX,	§	
SINDICATO DE TRABAJADORES	§	
PETROLEROS DE LA	§	CIVIL ACTION
REPUBLICA MEXICANA a/k/a	§	NO. H-90-1767
PETROLEUM WORKERS	§	(JURY TRIAL
UNION OF THE REPUBLIC	§	DEMANDED)
OF MEXICO, JOAQUIN	§	
HERNANDEZ GALICIA	§	
a/k/a LA QUINA,	§	
SALVADOR BARRAGAN	§	
COMACHO, SERGIO BOLANOS,	§	
VICTORINO LOPEZ REYES,	§	
RAMIRO QUINONES FABELA,	§	
CARLOS MANUEL	§	
VASCONCELOS GUEVARA and	§	
MIGUEL ESTRADA ROJAS,	§	
Defendants.	§	

PLAINTIFF'S COMPLAINT

Plaintiff Arriba, Limited files this complaint against defendants Petroleros Mexicana a/k/a/ Pemex, Sindicato de

Trabajadores Petroleros de la Republica Mexicana a/k/a the Petroleum Workers Union of the Republic of Mexico, Joaquin Hernandez Galicia a/k/a La Quina, Salvador Barragan Comacho, Sergio Bolanos, Victorino Lopez Reyes, Ramiro Quinones Fabela, Carlos Manuel Vasconcelos Guevara and Miguel Estrada Rojas.

In support of its complaint, Arriba, Limited respectfully shows the Court as follows:

Parties

1. Arriba, Limited ("Arriba") is a Bahamian corporation. Its principal place of business is in Texas.

2. Defendant Sindicato de Trabajadores Petroleros de la Republica Mexicana a/k/a the Petroleum Workers Union of the Republic of Mexico ("the Syndicate") is an unincorporated association organized under the laws of Mexico. The Syndicate may be served through its offices in Mexico City at Zaragoza Num. 15, Colonia Guerrero, Mexico 3, D.F.

3. Comision de Contratos del Sindicato de Trabajadores Petroleros de la Republica Mexicana ("the Commission") is a corporate and administrative division of the Syndicate and may be served through its offices in Mexico City at Bahia de Todos Los Santos No. 37, 11300 Mexico, D.F.

4. Defendant Petroleos Mexicanos a/k/a Pemex ("Pemex") is a commercial agency of the United Mexican States. Its principal office is at Avenida Marina Nacional Num. 329, 11311 Mexico, D.F. Pemex may be served pursuant to 28 U.S.C. §1608(b).

5. Defendant Joaquin Hernandez Galicia a/k/a La Quina ("Hernandez") is a Mexican citizen. He has, for more than thirty years, been the acknowledged leader of the Syndicate.

6. Defendant Salvador Barragan Comacho ("Barragan") is a Mexican citizen. He has, for more than thirty years, held high office in the Syndicate.

7. Defendant Sergio Bolanos ("Bolanos") is a Mexican citizen. He was the prestanombre (financial trustee) of the Syndicate, in charge of its investments.

8. Defendant Victorino Lopez Reyes ("Lopez") is a Mexican citizen. He was the president of the Commission.

9. Defendant Ramiro Quinones Fabela ("Quinones") is a Mexican citizen. He was employed by the Syndicate and the Commission as attorney-in-fact. He also served as the agent of officials of Pemex and the Syndicate in soliciting bribes for them.

10. Defendant Carlos Manuel Vasconcelos Guevara ("Vasconcelos") is a Mexican citizen. He was the Syndicate's section leader in the area encompassing the Minatitlan Refinery.

11. Defendant Miguel Estrada Rojas ("Estrada") is a Mexican citizen. He was the treasurer of the Syndicate.

Jurisdiction

12. Because Pemex is an instrumentality of a foreign state under 28 U.S.C. §1603(b), this Court has subject-matter jurisdiction under 28 U.S.C. § 1330(a). This

action is based upon commercial activity carried on by Pemex in the United States, and also upon acts performed in the United States in connection with Pemex's commercial activity elsewhere, and also upon commercial activity by Pemex that caused direct effects in the United States. In addition, Pemex has waived its immunity to suit. See 28 U.S.C § 1605(a).

13. Because this suit is based in part upon the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., this Court has subject-matter jurisdiction under 18 U.S.C § 1964(c) and 28 U.S.C. § 1331.

14. Because the suit is between a citizen of Texas and citizens of a foreign state, this Court has subject-matter jurisdiction under 28 U.S.C. § 1332(a)(2).

15. This Court also has jurisdiction over the claims brought under state law, by virtue of the doctrine of pendent jurisdiction.

Venue

16. Venue in this Court is proper under 28 U.S.C. § 1391(b), 28 U.S.C. § 1391(f) and 18 U.S.C § 1965(a).

Background

17. The activities of Pemex, the Syndicate and the Commission are inextricably intertwined. Often one serves as agent for another. A substantial portion of Pemex's business opportunities are tendered to the Syndicate, which in turn channels many of those opportunities through the Commission. Other opportunities are channeled through Grupo Serbo, a family of entities controlled by Hernandez

and Bolanos. They also may have been controlled in part by a former Director General of Pemex, Diaz Serrano.

18. Representatives of Pemex, the Syndicate and the Commission make representations and promises on behalf of one another. The business of each is structured so that it is necessarily dependent upon the cooperation of the others.

19. In 1984, Bill Flanigan (later the president of Arriba) met with Quinones and others, who were acting as the agents and representatives of the Commission, the Syndicate and Pemex. Their meetings concerned the sale of residual oil, or "slop oil," from Pemex.

20. At the request of Quinones, Flanigan arranged for the incorporation of a company under the law of The Bahamas. That company is the plaintiff, Arriba. The Syndicate suggested The Bahamas as a desirable location for the incorporation of its trading partner because of the Syndicate's banking relationships there.

21. In October 1984, Arriba entered a binding written Agreement with the Commission. Under that Agreement, the Commission agreed to sell to Arriba a minimum of 6 million net barrels of Minatitlan Refinery Resid A oil. The Agreement was signed in Houston, and it contained the following choice-of-law and choice-of-forum provision:

> 17.02 This Agreement shall be governed by the laws of the State of Texas, and all suits brought on this Agreement shall be brought in a court of competent jurisdiction in Harris County, Texas.

Defendant Quinones signed the contract on behalf of the Commission, after presenting proof that he had been authorized to act as its attorney-in-fact. He also represented to Arriba that Pemex and the Syndicate would in fact make the residual oil available for sale to Arriba. Press reports in Mexico confirmed that in fact the Syndicate had been given the rights to market the residual oil.

22. In reliance upon the representations and promises made by Quinones and his associates, Arriba successfully contracted to resell the residual oil at a substantial profit.

23. Beginning in November 1984, Quinones and his associates demanded payments from Arriba, to be used to pay Pemex and Syndicate officials to perform the Agreement. Arriba refused to pay.

24. On many other occasions, Quinones demanded extortionate payments to give Pemex and the Syndicate an incentive to perform the Agreement. Again and again, Arriba refused.

25. The defendants have used similar extortionate tactics in slop oil dealings with and through other companies. On information and belief, those companies include Hi-Tech Exports, Tymco Ltd., Ammexo Industries and BMR Enterprises. On information and belief, the defendants have not honored their obligations to any of those companies.

26. On two occasions, Arriba's president was physically assaulted by Quinones and his companions for resisting their extortionate demands and for stating that Arriba was prepared to sue in order to enforce its lawful rights under the Agreement.

27. In 1985, Syndicate officials met with Flanigan on several occasions to assure Arriba that Pemex, the Syndicate and the Commission would perform the Agreement. Flanigan was taken to sample the oil at Pemex's Minatitlan refinery, so that Arriba could prepare for delivery and resale.

28. The Commission did not perform its obligations under the Agreement with Arriba. The Commission continually affirmed those obligations, but it did not perform them. Similarly, the Syndicate affirmed that it stood behind the Agreement and that it would ensure performance, but it did not do so.

29. Flanigan and others met with Hernandez, who was the head of the Syndicate. Hernandez affirmed that Pemex had given the Syndicate permission to sell the residual oil, and that it would be delivered to Arriba. That did not happen. At the time, Hernandez enjoyed the power and prerequisites of a high-ranking Mexican governmental official. In fact, he ran Pemex, along with its Director General.

30. In the summer of 1985, Arriba sued the Syndicate, the Commission, Jose Sosa, Lopez, Vasconcelos and Quinones in the 281st District Court of Harris County, Texas. On April 3, that court entered a judgment ("the 1986 judgment") against those parties. The Syndicate, the Commission, Lopez, Sosa and Vasconcelos entered a general appearance through the law firm of Pena & Flores.

31. The 1986 judgment held the Syndicate and the Commission jointly and severally liable for $37.266 million, for breach of contract and attorney fees. In addition, The Syndicate, the Commission, Sosa, Lopez, Vasconcelos and

Quinones were held jointly and severally liable for $55 million, for conspiracy and punitive damages.

32. In 1987, Arriba took steps to collect the 1986 judgment. One such step was the filing of a writ of garnishment against Pemex. Another step was the attachment of valuable artifacts, jewelry and gold being stored by Lopez in a McAllen bank.

33. In response to Arriba's legitimate efforts to collect its valid judgment, the defendants set up a new Bahamian corporation with the name "Arriba" (that is, the same name as the plaintiff's). They then instructed that new bogus entity to sue Arriba in order to enjoin it from enforcing its valid judgment. That suit was a sham, designed to mislead and defraud the court.

34. In late 1987, representatives of the Syndicate and Pemex entered into settlement discussions with representatives of Arriba. A settlement of the judgment and ancillary proceedings was made, in the form of a written contract between Arriba and Comater, S. de R.L., a Mexican corporation formed by the defendants. In exchange for the contract with Comater, Arriba released the 1986 judgment debtors and Pemex. That settlement was reached with the express approval and encouragement of Hernandez, who gave his "blessing" to the new deal and stressed that it would be even more profitable to Arriba than the original Agreement was to have been.

35. The contract between Arriba and Comater was a 10-year Joint Venture Agreement. Under that contract, Arriba and Comater formed a joint venture to ship, refine, market and sell residual oil obtained by Comater from Pemex. Comater promised to deliver to the joint venture at least 30 percent of the residual oil obtained by it. Moreover,

until the first delivery of oil, Comater agreed to pay Arriba half of the income from the operation of three drilling rigs for Pemex. Comater was under the absolute and total control of Pemex and the Syndicate, as all parties freely acknowledged and understood.

36. Representatives of the Syndicate and Pemex represented to Arriba that they had the power and authority to arrange for Pemex to deliver substantial volumes of residual oil to Comater, and that they would in fact do so. They also represented to Arriba that they would in fact arrange for Comater to operate three drilling rigs for Pemex. None of these representations were true, and there was no performance under the Joint Venture Agreement.

37. Arriba would not have released the 1986 judgment but for the false representations made by Pemex and the Syndicate.

38. In February 1989, Arriba filed suit to rescind the release of the 1986 judgment and to enter a new judgment. In April 1989, Arriba recovered a judgment ("the 1989 judgment") for fraud against the Syndicate, the Commission, Sosa, Lopez, Vasconcelos and Quinones. The 1989 judgment reinstated the 1986 judgment. In addition, it held the Syndicate, the Commission, Sosa, Lopez, Vasconcelos and Quinones jointly and severally liable for an additional $180.75 million.

39. The total amount owing under the outstanding judgments is over $273 million, plus interest at 10 percent per year.

40. In June 1989, Arriba served two writs of garnishment upon Pemex, in an attempt to obtain satisfaction of the outstanding judgments against the judgment debtors.

That consolidated proceeding is now pending as Civil Action No. H-89-2442 in this Court.

41. In the months since June 1989, representatives of the Syndicate have represented to Arriba that Pemex is in the process of stripping the assets of the Syndicate, motivated at least in part by the desire to frustrate Arriba's enforcement of its judgment against the Syndicate. Because the judgment debtors' assets and business opportunities all involved the oil and gas business, on information and belief the assets must to some extent be in the control of Pemex. Representatives of the Syndicate have also threatened that the president of Arriba would be indicted in Mexico if Arriba filed additional actions against the defendants.

42. Over a period of several years, the defendants have engaged in a wide-spread pattern of racketeering activity. That activity includes the following:

- For the purpose of executing schemes to defraud and to obtain money by false representations and promises, the defendants have used the mails and interstate and telephone communications. See 18 U.S.C. §§ 1341, 1343 (mail fraud and wire fraud).

- The defendants have knowingly used intimidation and threats with intent to induce persons not to present testimony at an official proceeding. See 18 U.S.C. § 1512(a) (tampering).

- The defendants have knowingly engaged in misleading conduct with intent to induce persons not to present testimony at an official proceeding. See 18 U.S.C. § 1512(a) (tampering).

- The defendants have obstructed commerce by extortion, attempts to extort and conspiracies to extort. See 18 U.S.C. § 1951 (obstruction of commerce).

- The defendants have traveled in foreign commerce and used facilities in interstate and foreign commerce, with intent to promote and carry on extortion. See 18 U.S.C. § 1952 (unlawful travel).

- With intent to deprive the owner of property, the defendants have appropriated, and attempted to appropriate, the property without the owner's effective consent. See Tex. Penal Code chapter 31 (theft by extortion).

First Claim
(RICO - § 1962(a))

43. Under 18 U.S.C. § 1962(a), it is unlawful for any person who has received income from a pattern of racketeering activity to use that income in the operation of an enterprise whose activities affect foreign commerce. Under 18 U.S.C. § 1964(c), any person injured in his business or property by a violation of section 1962(a) may sue to recover threefold his damages and the cost of suit, including a reasonable attorney fee.

44. The Syndicate has received income from a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion -- and it has used that income in the operation of the Syndicate, an enterprise whose activities affect commerce between the United States and Mexico. Arriba has been injured by this conduct in its business or property.

45. Pemex has received income from a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion -- and it has used that income in the operation of Pemex, the Syndicate and the Commission, all of which are enterprises whose activities affect commerce between the United States and Mexico. Arriba has been injured by this conduct in its business or property.

46. Hernandez, Bolanos, Lopez and Estrada have received income from a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion -- and they have used that income in the operation of the Syndicate and the Commission, both of which are enterprises whose activities affect commerce between the United States and Mexico. Arriba has been injured by this conduct in its business or property.

Second Claim
(RICO) - § 1962(b))

47. Under 18 U.S.C. § 1962(b), it is unlawful for any person through a pattern of racketeering activity to maintain control of any enterprise whose activities affect foreign commerce. Under 18 U.S.C. § 1964(c), any person injured in his business or property by a violation of section 1962(b) may sue to recover threefold his damages and the cost of suit, including a reasonable attorney fee.

48. Through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion -- the Syndicate has maintained control over both the Syndicate and the Commission, both of which are enterprises whose activities affect commerce between the United States and

Mexico. Arriba has been injured by this conduct in its business or property.

49. Through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion -- Pemex has maintained control over Pemex, the Syndicate and the Commission, all of which are enterprises whose activities affect commerce between the United States and Mexico. Arriba has been injured by this conduct in its business or property.

50. Through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion -- Hernandez, Bolanos, Lopez and Estrada have maintained control over the Syndicate and the Commission, both of which are enterprises whose activities affect commerce between the United States and Mexico. Arriba has been injured by this conduct in its business or property.

Third Claim
(RICO - § 1962(c))

51. Under 18 U.S.C. § 1962(c), it is unlawful for any person associated with an enterprise whose activities affect foreign commerce to conduct the enterprise's affairs through a pattern of racketeering activity. Under 18 U.S.C. § 1964(c), any person injured in his business or property by a violation of section 1962(c) may sue to recover threefold his damages and the cost of suit, including a reasonable attorney fee.

52. The Syndicate is associated with the Commission, an enterprise whose activities affect commerce between the United States and Mexico. The Syndicate

conducts the Commission's affairs through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion. Arriba has been injured by this conduct in its business or property.

53. Pemex is associated with the Syndicate and the Commission, enterprises whose activities affect commerce between the United States and Mexico. Pemex conducts the Syndicate's and the Commission's affairs through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion. Arriba has been injured by this conduct in its business or property.

54. Hernandez, Bolanos, Lopez and Estrada are associated with the Syndicate and the Commission, enterprises whose activities affect commerce between the United States and Mexico. Hernandez, Bolanos, Lopez and Estrada conduct the Syndicate's and the Commission's affairs through a pattern of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel and theft by extortion. Arriba has been injured by this conduct in its business or property.

55. The defendants and others have joined together to form an association-in-fact enterprise, an ongoing organization whose members function as a continuing unit, with an existence separate and apart from any pattern of racketeering. Each defendant is associated with the association-in-fact enterprise, whose activities affect commerce between the United States and Mexico. Each defendant participates in the enterprise's affairs through a patten of racketeering activity -- to wit, mail fraud, wire fraud, tampering, obstruction of commerce, unlawful travel

and theft by extortion. Arriba has been injured by this conduct in its business or property.

Fourth Claim
(RICO - § 1962(d))

56. Under 18 U.S.C. § 1962(d), it is unlawful for any person to conspire to violate subsection (a), (b) or (c) of section 1962.

57. Under 18 U.S.C. § 1964(c), any person injured in his business or property by a violation of section 1962(d) may sue to recover threefold his damages and the cost of suit, including a reasonable attorney fee.

58. Pemex has conspired with the Commission, the Syndicate, Hernandez, Bolanos, Lopez and Estrada to violate 18 U.S.C. § 1962(a), (b) and (c).

59. Hernandez, Bolanos, Lopez and Estrada have conspired with each other and with Pemex, the Syndicate and the Commission to violate 18 U.S.C. § 1962(a), (b) and (c).

60. The Syndicate has conspired with the Commission, Pemex, Hernandez, Bolanos, Lopez and Estrada to violate 18 U.S.C. § 1962(a), (b) and (c).

Fifth Claim
(alter ego)

61. The Commission and the Syndicate are alter egos of Pemex.

62. The Commission was organized and has been operated as a mere tool or business conduit of Pemex. The Syndicate was organized and has been operated as a mere

tool or business conduit of Pemex. All of the defendants' business opportunities originate with Pemex. For example, Pemex exercised dominion and control or the residual oil sold to Arriba. (That oil is pumped directly into a fresh water lake, and is "stored" by floating it on top of the lake -- a flagrant and obscene ecological disaster not far from American borders.) The Commission, The Syndicate and Pemex disregard the separation of the corporate entity, and they lead others to do so.

Sixth Claim
(sham to perpetrate fraud)

63. The fiction of the Commission's separateness from Pemex has been used as a means of perpetrating actual and constructive fraud. The fiction of the Syndicate's separateness from Pemex has been used as a means of perpetrating actual and constructive fraud. Honoring the separateness of these entities would work injustice and inequity.

Seventh Claim
(agency)

64. The Commission has acted as the agent of Pemex.

65. The Syndicate has acted as the agent of Pemex.

Eighth Claim
(fraudulent transfer)

66. The transfer of assets from the Commission and the Syndicate to Pemex constitutes a fraudulent transfer.

That transfer was made with the actual intent to hinder, delay or defraud Arriba as judgment creditor.

67. The transfer of assets from the Commission and the Syndicate to Hernandez and Bolanos constitutes a fraudulent transfer. Those transfers were made with the actual intent to hinder or defraud Arriba as judgment creditor.

Jury Demand

68. Plaintiff hereby demands trial by jury on all issues.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that the defendants be cited to appear and answer herein, and that upon final hearing this Court award to the plaintiff the following damages and relief:

(a) monetary damages for threefold the damages caused by each defendant's violation of 18 U.S.C. § 1962, plus the cost of suit (including a reasonable attorney's fee),

(b) monetary damages against Pemex in the amounts owed to the plaintiff under the judgments against the Commission and the Syndicate,

(c) avoidance of all transfers from the Commission and the Syndicate to Pemex and to Hernandez, Bolanos, Lopez and Estrada, to the extent necessary to satisfy Arriba's claims against the Commission and the Syndicate,

(d) an injunction against further disposition of assets by the Syndicate, Pemex, Hernandez, Bolanos, Lopez

and Estrada, until Arriba's claims against the Commission and the Syndicate have been satisfied,

(e) an order permitting Arriba to levy execution on assets transferred from the Commission and the Syndicate (and proceeds from those assets),

(f) prejudgment and postjudgment interest in the maximum amounts allowed by law, and

(g) all other relief in law and equity to which the plaintiff may show itself to be justly entitled.

Respectfully submitted,

/s/ Wm. H. White
William H. White
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State Bar No. 21337300
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Attorney-in-Charge for Arriba, Limited

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ARRIBA, LIMITED,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION NO. H-89-2442
PETROLEOS MEXICANOS a/k/a/ PEMEX,	)	
Defendant.	)	

******

CERTIFICATION OF JOHN R. NEWTON

JOHN R. NEWTON hereby certifies as follows:

1. My name is John R. Newton. I am a principal associate and consulting economist with Nathan Associates Inc. For the past three years I have served as Director of the Macroeconomic Analysis Division of that firm. I have earned two university degrees in management and economics: the B.S. in Industrial Management from Georgia Institute of Technology in 1970 and the Ph.D. in Economics from the University of Colorado in 1978.

2. During the past fourteen years I have carried out research, taught university-level economics, and performed consulting assignments on Latin American

economic issues. For seven years during this period I lived and worked full time in Latin America, including two years in Mexico. I have carried out research on international trade and the petroleum industry in Mexico and have published the results in both Mexican and U.S. journals, including Management Today en Espanol, Business Review, Mexican-American Review, and Ciencia y Desarrollo. Since leaving Mexico I have returned several times on consulting assignments and trade missions. In addition to my direct Mexican experience, I have carried out management and organizational consulting assignments for both private sector and public sector clients in other countries in Latin America, as well as in Europe and Asia.

3. Susman Godfrey, as counsel for Arriba, Limited, have asked Nathan Associates and me to conduct a preliminary investigation into the following relationships:

A. The relationship between Petroleos Mexicanos (commonly known and hereinafter referred to as "Pemex") and the Sindicato de Trabajadores Petroleros de la Republica Mexicana (the STPRM or Mexican Petroleum Workers' Union, hereinafter referred to as the "Union"), concentrating on the degree of interpenetration of corporate control and responsibilities between the two.

B. The relationship between the Union and its Commission de Contratos (the Contracts Commission, hereinafter referred to as the "Commission"), identifying its form of ownership and the extent of its contracting authority. As set forth below, I have made an effort to pursue this preliminary investigation through sources that were publicly available within a short time.

4. On May 30 of this year I travelled to Mexico City, remaining one week and reviewing technical, political, and government publications and conducting other research relevant to the above issues. I consulted the following documents, among others:

A. The Contratos Colectivos de Trabajo Celebrados entre Pemex y el STPRM, 1983-89 (Collective Labor Agreements between Pemex and the Union for 1983,1985,1987, and 1989, hereinafter referred to as the "Labor Agreements").

B. The Marco Juridico Basico de Pemex, 1988 (the Basic Legal Framework of Pemex, 1988 edition, hereinafter referred to as the "Legal Framework").

C. A series of investigative articles in Proceso, a Mexican political and business journal.

D. A scholarly monograph entitled El Sindicato de Trabajadores Petroleros y sus Relaciones con Pemex y el Estado 1970-1985 by Angelina Alonso y Roberto Lopez (1986) of the Colegio de Mexico (hereinafter referred to as the "Colegio Study"), researching the history of the relationship between Pemex and the Union.

E. The audited financial statements, accounting notes, statements of responsibility, and description of corporate structure of Pemex, contained in a recent bond prospectus entitled Information Memorandum: DM 100,000,000 11 1/4% Bearer Bonds of 1990 (1995), (hereinafter referred to as the "Prospectus").

My preliminary conclusions, based on the review of the above documents and also on other research, are as follows:

Relationship Between Pemex and the Union

5. Several elements of the formal organization of and contractual agreements between Pemex and the Union indicate that the two are so closely interrelated as to be virtual partners in terms of economic behavior. This interrelationship is much stronger and much more pervasive than the relationship between management and unions in the United States. This conclusion is supported by the following citations.

A. The Ley Organica de Petroleos Mexicanos (Organic Law of Pemex, published in the Legal Framework) requires that five of the eleven members of Pemex' Board of Directors must be Union members. Of the remaining six members, appointed by the President of the Republic, there is no prohibition of past Union status. This requirement is set out in Article 5, page 48 of the Legal Framework and is repeated in the certifications provided on page 6 of the Prospectus.

B. The Labor Agreements of 1983, 1985, and 1987 require that a minimum of 50 percent of all third-party contracts awarded by Pemex must be awarded to companies owned by the Union. Half the employees of the non-Union-owned companies to which the remaining 50 percent of all third-party contracts may be awarded must be Union members. These requirements appear in Understanding No. 43 to Clause No. 6, pages 440-442 of the 1983 Labor Agreement, and are repeated in the 1985 and 1987 Labor Agreements.

C. Pemex must pay an amount equal to 2 percent of the gross value of all third-party contracts directly to the Union, in addition to the amount of the contracts themselves. This requirement is stated in Chapter VII, Clause No. 36, page 65 of the 1983 Labor Agreement and is repeated in the 1985 and 1987 Agreements.

D. Pemex may, at its discretion, award contracts to Union-owned companies on a non-competitive basis, as indicated in Understanding No. 43, Clause No. 6, Item No. 3, page 441 of the 1983 Labor Agreement, and repeated in the 1985 Labor Agreement.

E. Through a Commision Mixta, a decision making group composed of three Union representatives and three Pemex representatives, the Union shares with Pemex full authority to hire (and implicitly fire) Pemex employees who are Union members, according to Clause Nos. 4 and 7, pages 44,45,48 and 49 of the 1983 Labor Agreement. With respect to designation of "personal de confianza" (literally "trust employees" or appointed posts, equivalent to corporate management personnel in the U.S.) Pemex is obliged to designate some Union employees to such positions, according to Clause No. 3, Fourth Group, page 39.

The result of these organizational and contractual relationships between Pemex and the Union is that each organization has major influence over the actions of the other, while profiting from those actions. This commonality of interests implies a degree of corporate interpenetration not found in U.S. labor relations.

6. Other elements of the Labor Agreements and the Legal Framework indicate direct Pemex responsibility for certain activities of the Union and Union members, as follows:

A. The 1981, 1983, and 1985 Labor Agreements include the phrase "... as concerns the Law of Public Works, the contracts specified in the above mentioned agreement of November 27, 1980, and in particular those detailed in the fourth, fifth, and seventh Clauses of such document, should be considered as though they were executed by direct administration of Petroleos Mexicanos .....". This reference is to those contracts administered by the Union's Contracts Commission and indicates Pemex responsibility for those contracts. The language is from an Administrative Agreement of November 27, 1980, which is included in the 1981 Labor Agreement (Understanding No. 43, Clause No. 6, pages 440-442) and repeated in the 1985 Agreement.

B. Union members may serve as personal de confianza without losing their Union status, as allowed in Chapter I, Clause No. 3, page 39 of the 1983 Labor Agreement. Union workers who have been designated to serve as personal de confianza retain the right to rejoin the Union once they leave the position of personal de confianza in agreement with Understanding 186 of the Federal Labor Law.

C. According to the Mexican Federal Labor Laws and the 1985 Labor Agreement, Chapter 26, Clause No. 260 Bis, page 239, "Negligences, imprudence, carelessness, lack of integrity or honesty and others incurred by personal de confianza will invariably be sanctioned" by Pemex, in agreement with what is

ordered by fraction X of Understanding 423 of the "Ley Federal del Trabajo".

The above elements of the Labor Agreements and Pemex' Legal Framework indicate Pemex responsibility for Union actions in many instances. This responsibility establishes a further link between the two organizations, again indicating joint decision making to an extent unknown in U.S. labor relations.

The Role of the Contracts Commission

7. The Union's Contracts Commission is the final arbiter of all third-party contracts awarded to Union-owned companies and is apparently owned by the Union, as shown by the following citations.

A. The 1983 Labor Agreement (Understanding No. 43, Clause No. 6, Item No. 3, page 441) specifies the Contracts Commission as the agency for distribution and administration of the 50 percent of all third-party contracts Pemex must award to the Union, and that specification is repeated in the 1985 Agreement.

B. The Contracts Commission is fully controlled by the Union through its officers, who compose its Board of Directors, according to the Colegio Study, page 189, footnote 158.

These citations indicate an identity between the Commission and the Union in terms of the third-party contracts, for which the further link between the Union and Pemex is discussed above.

Pemex Appropriation of Union Assets

8. Although it is generally known in Mexico that Pemex took control, at least temporarily, of certain Union and Commission assets in early 1989, after the arrest of the former President of the Union, Joaquin Hernandez-Galicia, and other officers, the process of appropriation is not described in public documents or in other documents thus far available. However, there likely exist administrative orders or memoranda within Pemex for individual acts of appropriation or sale.

Additional Document and Information Needs

9. Although the lack of independence between Pemex, the Union, and the Commission is documented above, further confirmation of the conclusions concerning the interpenetration of these entities, as well as Pemex' appropriation of Union assets, would require access to documents that are not readily available to me, including but not limited to the following:

A. The Actas Constitutivas y Estatutos Generales, Sindicato de Trabajadores Petroleros de la Republica Mexicana (STPRM), 1979-1989 (the constitution and bylaws of the Union for the years 1979-1989) should further describe the relationship of the Union and the Commission and the authority of either to enter into contract for Pemex or to sell petroleum products. They should be available through the Union and through Pemex.

B. The Concesion al Sindicato para realizar Ventas de Residuos de Petroleo mentioned in Paragraph 8 above should establish the degree of Pemex' acquiescence and involvement in the sale

of petroleum products by the Union. It should be available through Pemex.

C. Internal Pemex documents concerning the appropriation of property controlled by the Union and Commission during early 1989 should establish the extent to which Pemex may have rendered the Union unable to comply with contracts that Pemex itself may have allowed the Union to enter into. Such documents should be available through Pemex.

D. In addition to formal documents indicating the relationship between Pemex, the Union and the Commission, Pemex should have documentary evidence of the actual business relationships among these entities.

Conclusions

10. I have reached the preliminary conclusion that Pemex and its labor Union are interrelated in terms of formal organization and contractual agreement to such an extent that they often function as a single organization. This corporate interpenetration results in unified decision making to a degree unheard of in U.S. corporate/labor relations. In order to finalize this conclusion and the other preliminary conclusions discussed above, I would need access to information that is not readily available to the public.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 10 ,1990.

/s/ John R. Newton
JOHN R. NEWTON

TRANSLATION

(LETTERHEAD OF "CONSEJEROS CORPORATIVOS FISCALES, S.A. DE C.V."

SUSMAN GODFREY
ATTENTION: ATTORNEYS
MESSRS. WILLIAM H. WHITE
JAMES T. MC CARTT.

LEGAL OPINION

My name is JOSE R. PADILLA CASTELLANOS. An extract of my CURRICULUM VITAE, may be given as follows:

1.- I was born on October 7, 1936 in San Miguel el Alto, (State of) Jalisco.

2.- I obtained a degree as a Licentiate at Law from the "Universidad Nacional Autonoma de Mexico" (National Autonomous University of Mexico).

3.- Since 1972 I have held a chair as Professor of Constitutional, Constitutional Guarantees and "Amparo" (a special Mexican writ that constitutionally guarantees the protection of civil rights as mentioned below) law, at the National Autonomous University of Mexico.

4.- I have been a Lecturer at various universities and educational and cultural institutions.

5.- Since 1973 I have been a member of "Barra Mexicana Colegio de Abogados, A.C." (Mexican Bar Association).

6.- I am author of a work entitled "SINOPSIS DE AMPARO" (SINOPSIS OF THE AMPARO WRIT), the fourth edition of which is about to be published.

7.- I am author of a monograph entitled "El Amparo contra Leyes" ((The Writ of) Amparo against Laws) published in "EL FORO", the (official) publication of the Mexican Bar Association.

8.- In 1981 I participated in the First International Congress on Tax and Administrative Justice which was held in Mexico City. (At that Congress) I presented a work on "El Problema Fiscal en la Constitucion Mexicana" (The Problem of Taxation Under the Mexican Constitution).

9.- I specialize in the writ of "Amparo" as it pertains to tax and administrative matters.

10.- I am a partner and in charge of "Amparo" matters in the law firm entitled "Consejeros Corporativos Fiscales, S.A. de C.V." (Corporate (and) Tax Counselors, S.A. de C.V.).

11.- I hold an appointment as a member of the Seminary on Constitutional and "Amparo" (law) in the Law School of the National Autonomous University of Mexico.

12.- I am a member of the Association of Professors of Constitutional, Constitutional Guarantees and "Amparo" Law of the Law School of the National Autonomous University of Mexico.

13.- I am a founder of the "Instituto Mexicano del Amparo, AC" (Mexican Institute on Amparo, A.C.).

14.- I am a member of the Committees on Constitutional and "Amparo" Law (and) of Public Finance and Tax Law of the Mexican Bar Association.

With the foregoing antecedents, and in particular my specialization in Constitutional, Constitutional Guarantees and "Amparo" law of Mexico, I proceed to respond to the questions raised by the Attorney General of the Mexican Republic in his opinion of August 24, 1990, referring to

Cause H.-90-1767, Arriba Ltd. v. Petroleos Mexicanos, et al.

Such opinion was rendered by such official in response to a consultation addressed to him by C.P. FRANCISCO ROJAS, Director General of said decentralized institution.

Preliminarily I believe it pertinent to explain that the Mexican Amparo consists of a suit or proceeding in the Federal Courts of this country having for its purpose guaranteeing (the protection) of individual (civil) rights granted to individual persons and legal entities by the General Constitution of the Mexican Republic. This protection is afforded against Laws and actions of the Government, not only of the legislative and executive but of the judicial (branch) as well.

FIRST PART
LEGAL STATUS OF PETROLEOS MEXICANOS

FIRST.- What is the scope of Article 17 of the Organic Law of Petroleos Mexicanos, in providing that:

> "In all actions, agreements and contracts in which Petroleos Mexicanos participates, federal laws shall be applicable, and the controversies to which it is party, regardless of their character, shall be under the exclusive jurisdiction of the Courts of the Federation"?

The meaning and scope of this legal provision is limited to the Mexican territorial area, to exclude the local Courts which also exist in this country since it is a Federation.

In conclusion, one may affirm that only the Federal Courts may take cognizance of causes involving complaints or suits against Petroleos Mexicanos, which are the Federal Tribunals or Courts; those having local jurisdiction are incompetent.

Thus, said Article 17 of the Organic Law of Petroleos Mexicanos is limited in that it only defines the jurisdiction of Mexican Courts within the Mexican Republic itself and has no reference or application to Courts outside of Mexican territory.

SECOND.- May Petroleos Mexicanos sue and be sued in a Foreign Tribunal or Court?

Of course it can, taking into account particularly that the seventh article of said Organic Law of Petroleos Mexicanos grants it the most ample powers to carry out all legal acts that may be required for the fulfillment of its object (or purpose).

And that Article 13 of that same Organic Law grants to the Director General and the Assistant Directors of Petroleos Mexicanos "all powers pertaining to general attorneys-in-fact (under general powers of attorney) for lawsuits and collections ++++ in terms of the first three paragraphs of Article 2554 of the Mexican Civil Code for the Federal District and Territories.

Said Civil Code grants said powers for the exercise thereof within as well as outside of the Mexican Republic.

THIRD.- May Petroleos Mexicanos, in the light of its legal structure and entity purposes enter into contracts abroad and submit itself to the Tribunals or Courts of other countries?

Of course it can. It is a juridical or legal entity with its own "patrimony" (net worth or assets), decentralized from the Federal Government and having the need to enter into contracts in all parts of the world and therefore it is under the imperative of being able to agree to the submission of its controversies to the Courts of other Nations.

These types of practices are not only permitted by custom relating to legal and commercial relations but are also necessary, and in some cases even indispensable.

Resorting thereto is correct, advantageous and of equal effect to the contracting parties. Each one of them agrees, without doubt, in a free and informed manner as it best suits its convenience.

FOURTH.- In the light of its entity purposes, to explore for national hydrocarbon resources, may Petroleos Mexicanos be under a disability to submit its controversies to Foreign Courts?

It is not under such a disability, nor could it be under one. If it had such it would prejudice the other contracting parties, as well as the interests of Petroleos Mexicanos itself.

It would always be necessary to resort first to the Mexican courts in order to sue, even though the contract may have been entered into in another country, and the enforcement thereof were also to take place outside of Mexico.

In summary, it may not be legally affirmed that Petroleos Mexicanos, because it is an entity exploiting a most important Mexican national economic resource, may enjoy a status of procedural privilege either within or outside of the Country (Mexico).

We are dealing here with a legal entity which has the same rights and obligations as others.

SECOND PART
PETROLEOS MEXICANOS AND ITS COMMERCIAL PRACTICES

FIRST.- Must one consider a certain affirmation made by the Attorney General of the Mexican Republic to be absolute and unchallengeable from a legal standpoint, which affirmation is to the effect that because of the recent campaign for moralization and constitutional and legal reforms, it was determined that:

> "Any contract which does not adhere to established procedures or those involving meetings of the mind which are legitimate in their purpose, but entered into in a manner other than as provided by federal laws, would be considered null as a matter of law"?

In Mexico no legal act is null as a matter of law, it is always necessary for the determination of such nullity to be made by judicial authority.

This arises because of the system of law or of constitutional guarantees governing persons in Mexico, whether individuals or legal entities.

In order for a person, whether an individual or a legal entity, to be deprived of a right which it has acquired, (such person) must first be heard and overcome in an action brought before judicial authority.

These rights, which are provided in the Constitution and in pertinent Laws, in Mexico run in favor of (Mexican) nationals in the same way as aliens, (and) equally (to)

individuals as well as legal entities (Article 1 of the General Constitution of the Republic).

SECOND.- Plaintiff Arriba, Ltd. must be considered for purposes of this opinion as a party in good faith which entered into a contract for the delivery of 6 million net barrels of residual oil, on the part of Petroleos Mexicanos and in consequence did it acquire rights in conformity with such contract?

As a party in good faith, it did acquire rights against Petroleos Mexicanos upon execution of said contract, which has not been performed.

Under such circumstances, it has the right (to call) for its performance, also to claim (the same) before the Courts of Harris County, Texas, designated in the contract, by virtue of the agreement of submission to those Courts.

THIRD.- What specific guarantee of legal protection is violated when a Law or "Acuerdo" (Accord) arises in Mexico that affects rights that were acquired prior thereto upon the execution of a contract?

This (question and response) is presented because of the attempt of the Attorney General of the Republic to declare by (means of) his opinion in the year 1990, the nullity of contracts and acts arising prior thereto.

The guarantee which is violated is the (guarantee) against retroactivity of (legal) Norms, set out in the first paragraph of Article 14 of the "Magna Carta", which provides that:

"No Law shall be given a retroactive effect in prejudice of any person".

And the Jurisprudence reiterated by the Honorable Supreme Court of Justice of the Nation, which is stated as follows:

> "A law is retroactive when it operates upon the past and affects rights which have been acquired under the coverage of a prior law".

FOURTH.- May Petroleos Mexicanos be excepted from having to perform obligations that were agreed upon as in the instant case, based on amendment of the General Constitution of the Republic, issuance of regulatory laws and promulgation of "acuerdos" (accords) dealing with the moralization of Mexican society?

It is one thing to launch a political campaign having a great philosophical and social context and to issue legal provisions relating thereto and another for such intentions to be fulfilled to the letter (of those provisions).

The truth or reality in this case is that Petroleos Mexicanos, as evidenced in the record, continued to act legally or illegally, through the Union and the Contracts Commission of the same Union which links it with its workers.

The Attorney General acknowledges that this situation existed until the beginning of 1984; however, he states that it disappeared in one fell blow, as a result of the legal provisions that were issued.

The truth is otherwise, it (the situation) continued as a public and notorious fact during months and years after that, as mentioned below in response to the Third and Fourth questions that are set out in the Third Part of this opinion.

FOURTH.- What is the legal status of the Attorney General of the Mexican Republic and what is the legal scope of his opinions?

As respects the case under consideration, he is the Legal Counselor of the Government (5th and last paragraph of Article 102 of the Federal Constitution).

His opinions constitute the opinion of the Federal Executive Branch of the Mexican Government.

This posture of the Federal Executive Branch is challengeable in all cases and circumstances; even more so, when it affects rights acquired by third parties in good faith, as is the case of the plaintiff.

It is not an opinion that has absolute effects, in view of the existence of rights and constitutional guarantees that are the norms of the Mexican legal system, as has been discussed under a preceding question.

As respects the opinion which is the subject matter of this response, since it is a part of a judicial controversy, it has the character solely of that of an attorney representing an interested party in such controversy, and is subject to the same rights and procedural burdens as those of the plaintiff or moving party in this case.

THIRD PART

LEGAL STATUS OF THE PETROLEUM WORKERS' UNION OF THE MEXICAN REPUBLIC AND OF THE CONTRACTS COMMISSION THEREOF, "SOCIEDAD CIVIL" (CIVIL ENTITY)

FIRST.- Do Petroleos Mexicanos, its Union and the Contracts Commission of the latter, have different legal natures and entity objects (or purposes)?

Yes, they do have different (legal) natures and entity objects (or purposes).

SECOND.- May the legal entities under considerations establish interrelationships for the purpose of carrying out the entity purposes of the three (entities)?

Yes. Mexican Laws do not provide any impediment, so long as the object or purpose are legitimate as in the case we are considering.

THIRD.- How notorious in Mexico was the interrelationship between Petroleos Mexicanos, its Union and such Contracts Commission for the purpose of contracting with third parties, (Mexican) nationals and aliens?

Extremely so. The situation which we have characterized as notorious was disseminated in Mexico through all of the means of communication of the mass media and of specialized (publications).

There are basis for assuming that the practices of commercial interrelationships that have been referred to, were well known abroad, especially in North America; since even more detailed news were received from abroad concerning such practices of commercial interrelationship.

Evidence of the foregoing affirmation may be found in the newspaper and magazine collections that are available to the public, for its consultation examination and study, at the "hemerotecas" (newspaper and magazine archives) which

the Mexican Federal Government is required to maintain by Law.

FOURTH.- Did those practices of commercial interrelationship between Petroleos Mexicanos, its Union and the Contracts Commission of the latter, have support in the Law and in their labor relations?

Of course they did. The Organic Law of Petroleos Mexicanos provides in Article 5 thereof, that its Board of Directors shall consist of eleven members, six of whom shall represent the Federal Executive and the other five shall be appointed by the Union, from among its active members who are permanent employees (of Petroleos Mexicanos).

And a number of economic and commercial relationships arise under the collective labor contracts entered into between Petroleos Mexicanos and its Union.

Specifically, under Clause 36, and under Accord (Understanding) No. 43 to this same Clause, of the 1983 collective contract and in the corresponding provisions of the collective contracts of 1985 and 1987, provisions may be found to the following effects:

(a) The Union is granted the right to receive two percent (2%) of the gross value of all third-party work and service contracts.

(b) The Union and its entities (companies) are assigned the right to receive a minimum of fifty percent (50%) of all contracts awarded by Pemex.

(c) The contracts referred to in (the preceding) subparagraph (b) may, in the discretion of Petroleos Mexicanos, be granted in disregard of the public bidding requirement set out in

the Law of Public Works, containing regulations pursuant to Article 134 of the Constitution, among other provisions of the same "Magna Carta" (Constitution) mentioned in the subject opinion, rendered by the Attorney General of the Mexican Republic.

(d) Pursuant to the 4th and 7th Clauses of the collective contract of 1983, a "Comision Mixta" (or Mixed Commission) composed of three representatives of the Union and three representatives of Petroleos Mexicanos, shares the full right to appoint and discharge so called "personal de confianza" (that is, administrative and executive personnel) of Petroleos Mexicanos itself.

Moreover, in the collective (labor) contracts of 1981, 1983, 1985 and 1987, the Contracts Commission and other civil entities (companies) of the Union are granted the right to execute work provided to be carried out by Petroleos Mexicanos through contracts in favor of third parties, "as though they were executed by direct administration of Petroleos Mexicanos . . ." and, in consequence, without having to comply with the requirement that such contracts be submitted to the competitive bidding procedure set out in the Law of Public Works and in Article 134 of the General Constitution of the Republic, as mentioned in subparagraph (c) of this Fourth response.

The foregoing establishes the direct and joint responsibility of Petroleos Mexicanos in connection with the contracts that the Contracts Commission and other civil entities (companies) of the Union have been entering into with third parties.

FIFTH.- In the light of these practices of interrelationship, in what situation did the plaintiff in this case, (Arriba, Ltd.) find itself?

As a third party in good faith, with the right to have its contract performed, by the principal and jointly liable party, Petroleos Mexicanos.

STATEMENT

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing opinion is true and correct.

(Signature)
Mexico, F.D., October 29, 1990

LLB/jks
3214C:\DOCS\ARR40001\001

CERTIFICATE AS TO FOREGOING TRANSLATION

I do hereby declare and certify as follows:

1. My name is Lyon L. Brinsmade. I am an attorney duly admitted and in good standing to practice law in the State of Texas (Texas Bar number 03005000). My offices are located at 3500 NCNB Center, 700 Louisiana, Houston, Texas.

2. I am duly qualified to translate documents from Spanish into English, and vice-versa, having completed advanced academic studies in the United States and in the Republic of Mexico as respects each of those languages, being completely bilingual and fluent therein, and having interpreted and translated documents from Spanish into English, and vice-versa, in connection with my practice of law over a period of more than thirty (30) years past.

3. I hereby certify under penalty of perjury under the laws of the United States of America that the foregoing translation of the Legal Opinion of Lic. JOSE R. PADILLA CASTELLANOS executed under date of October 29, 1990, is, to the best of my knowledge and ability, true and correct.

EXECUTED on this 31st day of October, 1990.

/s/ Lyon L. Brinsmade
Lyon L. Brinsmade

EXCERPTS FROM THE ORGANIC ACT OF PETROLEOS MEXICANOS
(English translation)

ART. 13-- The Director General and Subdirectors shall have all authority corresponding to the general agents for litigations and collections, for ownership and management actions, and special authority requiring a special clause according to the Law, in the terms of the first three paragraphs of Article 2554 of the Civil Code for the District and Federal Territories; to obtain credit and to grant or sign credit instruments according to Article 9 of the General Law of Credit Instruments and Operations, with previous authorization from the Departments of the Presidency and of the Treasury and Public Credit; to file complaints in cases of crimes which may only be pursued at the request of the victim, and to grant extinctive pardon of the penal action. The Director General may grant and revoke general or special powers, but when they are in favor of persons outside Petroleos Mexicanos, he must previously obtain approval from the Board of Directors.

ART. 17-- In all actions, agreements and contracts in which Petroleos Mexicanos is involved, the Federal Laws shall apply, and the disputes in which it is a party, whatever their nature, shall be the exclusive jurisdiction of the Federal Courts.

Petroleos Mexicanos is excepted from granting the guaranties required of the parties by the legal codes in connection with such controversies.

The bonds issued to guarantee obligations in favor of Petroleos Mexicanos must be granted, in all cases, by legally established Mexican companies, that are expressly authorized to operate in the business.

Source: Exhibit A-1 to Pemex's Reply to Arriba's Consolidated Response to Pemex's Pending Motions (filed in the district court).

EXCERPT FROM THE CIVIL CODE FOR THE FEDERAL DISTRICT AND TERRITORIES OF MEXICO (English translation)

Art. 2554.--In all general powers of attorney for lawsuits and collections, it shall be sufficient to say that the power is granted with all the general powers and with the special powers which require a special clause in accordance with law, in order that they may be considered as conferred without any limitation.

In general powers of attorney to administer property, it shall be sufficient to state that they are given with that character, in order that the attorney in fact may have all kinds of administrative powers.

In general powers of attorney to exercise acts of ownership, it shall be sufficient that they be given with that character, in order that the attorney in fact may have all the powers of an owner, both with respect to the property, and in order to take all kinds of steps to defend it.

If in the three cases above mentioned, it should be desired to limit the powers of the attorneys in fact, the limitations shall be set out, or the powers of attorney shall be special powers of attorney.

Notaries shall insert this article in the notarial copies of powers of attorney which they execute.

Source: THE MEXICAN CIVIL CODE 460 (Michael W. Gordon trans. 1980).